Supreme Court, U.S.
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No. ———

IN THE
SUPREME COURT OF THE UNITED STATES

B. WILLIS, C.P.A., INC.,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma corporation; BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, a foreign corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Must a landowner accept just compensation when a private condemnor seizes land for a private or non-public use?

Is there a procedural due process right to a predeprivation hearing on public use when a private condemnor files condemnation proceedings in state court against private property?

Does a property owner have standing to maintain an action under 42 U.S.C. §1983 in federal court against a party who seizes his property by subverting the judicial process?

When multiple constitutional violations are alleged in an action brought under 42 U.S.C. §1983 may a federal court base its decision on what it defines as "the predominant claim"?

Is a plaintiff required to seek "just compensation" in state court before bringing an action under 42 U.S.C. §1983 in federal court for violations of specific constitutional protections?

Are federal courts required to follow state law as pronounced by the state Supreme Court and conform their decisions to the latest decision of the state Supreme Court?

PARTIES TO THE PROCEEDING

Petitioner

B. Willis, C.P.A., Inc., is a professional corporation wholly owned by Buck Willis, C.P.A. It has no subsidiaries.

Respondents

Burlington Northern Railroad Company merged on December 31, 1996, to become the Burlington Northern and Santa Fe Railway Company. It is a wholly owned subsidiary of Santa Fe Pacific Corporation which in turn is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation, a publicly traded corporation.

Public Service Company of Oklahoma is a wholly owned subsidiary of Central and Southwest Corporation. It has previously identified the following parent, subsidiary and affiliated companies that have issued shares to the public.

1. Central & Southwest Services
2. CSW Credit
3. CSW Communications
4. CSW Energy
5. CSW International
6. CSW Leasing
7. Central Power & Light Co.
8. EnerSho
9. Southwest Energy & Power Co.
10. West Texas Utility Co.
11. Ash Creek Mining Co.

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The Order and Judgement of The United States Court of Appeals for the Tenth Circuit is unpublished. A copy of the Order and Judgement is included in the Appendix at Appendix A at 1a-10a. The Orders of the District Court for the Northern District of Oklahoma are unpublished and included as Appendices H, I, J & K. The opinion of the Oklahoma Supreme Court in the related state eminent domain proceeding is reported at 941 P.2d 995 (Ok. 1997). A copy of the opinion is included at Appendix M at 41a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgement on May 27, 1999. On June 9, 1999, Petitioner filed a Petition for Rehearing En Banc which the United States Court of Appeals denied on July 9, 1999. (App. at 39a).* This Petition for Writ of Certiorari is filed within 90 days of the Order and Judgement and the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amdt. I

Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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* Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

U.S. Const., Amdt. XIV, Sec. 1

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * * * *

Oklahoma Const. Article 2, Sec. 24

...In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

STATEMENT OF CASE

The basis of this action is the acts of Public Service Company of Oklahoma ("PSO") and Burlington Northern Railroad Company ("BN"), in appropriating the use of the property of Petitioner, B. Willis, C.P.A. Inc. ("Willis") under color of state law prior to a hearing and judicial determination of the public use of such appropriation in violation of Willis' constitutional and statutory rights as established by the decision of the Oklahoma Supreme Court.

In 1990, PSO became embroiled in litigation with BN when PSO breached their coal hauling contract when it became cheaper to ship on Union Pacific (See PSO v. BN, 53 F.3d 1090 [10th Cir. 1995]).

PSO subsequently filed an action in state court against Willis to condemn a railroad right-of-way over Willis' property. PSO was represented by its regular law firm of Doerner, Saunders, Daniel and Anderson, whose eminent domain department is one of the best, if not the best in Oklahoma.[1] PSO also retained as local "counsel" the President Pro Tempore of the Oklahoma Senate, Senator Stratton Taylor. Willis challenged the right of PSO to take its property on various grounds including that the taking was not for public use. After an ex parte conference between Senator Taylor and the state district judge, the state district court denied Willis the right of discovery and a hearing on the judicial issue of public use on March 8, 1994 after admitting

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[1] The present Chief Judge of the United States Court of Appeals for the Tenth Circuit, the Honorable Stephanie K. Seymour, is a former eminent domain attorney for this firm. See City of Pryor Creek v. Public Service Co. of Oklahoma, 536 P.2d 343 (Okl. 1975)

in open court that Willis had a right to such a hearing.[2] Willis appealed to the Supreme Court of Oklahoma.

After procuring a court order that flagrantly violated Oklahoma eminent domain law PSO hurriedly built a railroad across the property. On March 21, 1995, the intermediate Oklahoma Court of Civil Appeals held that Willis had been wrongfully denied discovery and an adversarial hearing on the judicial issue of the right of PSO to take the property.

On April 3, 1995, after Willis demanded that BN cease trespassing and while the case was on appeal, PSO filed a second petition in the same case and had the same state judge subject Willis to an injunction because Willis had taken the position that BN was trespassing, notified BN to stop trespassing, written letters and posted signs. **Willis has never made any attempt to actually block the line.**

On January 6, 1996, Willis filed a diversity action against BN in the United States District Court for the Northern District of Oklahoma, for trespass under Allen v. Transok Pipeline Co, 552 P.2d 375 (Ok. 1976). The U. S. District Court had jurisdiction under 28 U.S.C. §1332(a)(1). BN answered that it was licensed by PSO to use an easement acquired in the condemnation proceedings.

PSO then notified Willis that by petitioning a Federal

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[2] Subversion of the judicial process by politician lawyers is a recurring problem in Oklahoma. For an excellent description of the practice and problem by a former Chief Justice, see JUSTICE FOR SALE - The Shocking Scandal of the Oklahoma Supreme Court, Berry William A. and Alexander, James E., Macedon Publishing Co., Oklahoma City, OK., 1996, pp. 122-127

Court, Willis had violated the state injunction and demanded a dismissal of the trespass suit against BN and threatened to intervene and seek dismissal. Willis countered by filing a 42 U.S.C. §1983 action against PSO and later by a Motion for Summary Judgement asserted §1983 claims against BN as well. The U. S. District Court had jurisdiction under 28 U.S.C. §1343(a). Willis asserted claims for violation of the First Amendment rights of freedom of speech and access to the courts and violation of the Fourteenth Amendment rights to due process of law and equal protection of the law. The District Court consolidated both actions on the grounds that the controlling issue was whether Willis was or was not entitled to a hearing in the condemnation proceeding in state court prior to PSO taking a possessory interest in the Willis property. On June 13, 1996, the District Court cut off Willis' discovery requests. On April 8, 1997, the District Court entered an Order holding that Willis was not entitled to a hearing prior to PSO taking possession of its property. The District Court entered a Final Judgment on May 13, 1997, holding for PSO and BN on the merits of the claims of Willis against them and dismissed both the trespass case and the 42 U.S.C. §1983 action. Willis filed a Notice of Appeal to the Tenth Circuit Court of Appeals on June 3, 1997.

On June 24, 1997, the Oklahoma Supreme Court issued its opinion in the state appeal holding that PSO's possession of Willis' property violated Willis' constitutional and statutory rights. App. M at 43a, ¶1.

Since the mandate was spread of record PSO and BN have simply ignored the decision of the Oklahoma Supreme Court and continued to utilize Willis' property as if the decision had never been issued. The state district court continues to enforce the injunction against Willis and PSO refuses to even provide Willis with discovery so any further

proceedings, if legally required, could take place.

On November 4, 1997, the U. S. District Court denied Willis' motion filed under Fed. R. Civ. P. 60(b) and on May 27, 1999, the Court of Appeals affirmed the District Court's judgement. On July 9, 1999, Petitioner's Petition for Rehearing En Banc was denied.

ARGUMENT FOR GRANTING WRIT

While the legal issues presented by this petition are of great national importance, none of the issues are novel. All have been addressed by this Court on numerous occasions.

The petitioner has been forced to seek relief from this Court because the Court of Appeals has issued a decision that rejects the controlling decisions of the United States Supreme Court on a wholesale basis and blatantly misstates Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court.

If the Court of Appeals decision is allowed to stand, 42 U.S.C. §1983 will have been effectively repealed in the Tenth Circuit.

ARGUMENT 1

A property owner is not required to accept just compensation when a condemnor seizes property for a private non-public use.

The decision of Tenth Circuit Court of Appeals dismisses Willis' §1983 claim with the assertion:

> Virtually all of plaintiff's complaints derive, in one way or another, from the eminent domain proceeding prosecuted by PSO...Thus until

> that proceeding is concluded, any objections he may have cognizable under the most directly pertinent provision of the federal constitution-the Just Compensation Clause (JCC)-are not ripe for adjudication and must be dismissed for lack of subject matter jurisdiction under Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-96 (1985). App. A at 5a.

In Williamson County, 473 U.S. at 194, this Court held that:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.

The Tenth Circuit's reliance on this holding is completely misplaced. While the Fifth Amendment may only proscribe taking property without just compensation, this Court has long held that taking property by eminent domain for a private or non-public use was proscribed by the due process clause of the Fourteenth Amendment. Hairston v. Danville & W. R. Co., 208 U.S. 598, 28. S.Ct. 331 (1908); Missouri Pacific Ry. Co. v. State of Nebraska, 164 U.S. 403 17 S.Ct. 130 (1896); Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S.Ct. 56, (1896); Kaukauna Water-Power Co. v. Green Bay & Mississippi Canal Co., 142 U.S. 254 12 S.Ct. 173 (1891); Clark v. Nash, 198 U.S. 361,25 S.Ct. 676 (1905).

As was held in Hawaii Housing Authority v. Midkiff,

467 U.S. 229, 241, 104 S.Ct. 2321, 2329 (1984):

> To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, **even though compensation be paid.**" **(Emphasis added)**

Justice Stevens in his concurring opinion in Williamson County, 473 U. S. at 202, 105 S.Ct. at 3124, 3125, acknowledged that there were some state actions affecting private property that were impermissible "even if the government is willing to pay for them.."

This Court in addressing rights under state eminent domain law stated:

> "...It is his private property under the protection of the Constitution and **it cannot be taken** or its value lessened or impaired even for public use without compensation or **without due process of law and it cannot be taken at all for anyones private use.**" With respect to such rights, **we have held the law of the State as declared by its Supreme Court is controlling as a rule of property.** (Emphasis added) Kaukauna Water Power Company v. Green Bay and Mississippi Canal Co., 12 S.Ct. at 177.

The law of Oklahoma as declared by its Supreme Court is set forth in PSO v. Willis, 941 P.2d 995 (Ok. 1997) (see App. M at 41a). This decision makes it quite clear that under Oklahoma eminent domain law when a landowner challenges the public use of a proposed taking:

1. All presumptions are in favor of those whose property is sought to be taken against their will. If public use is challenged the taking is presumed an impermissible private use until proven and adjudicated otherwise. App. M at 49a, ¶16.

2. At the hearing to adjudicate the character of the use the condemnor bears the original burden of proof and must make out a prima facie case of public use to shift the burden of proof to the landowner. App. M at 48a, ¶14.

3. The condemnor may not appropriate the property until the public use is established. App. M at 43a, ¶1, 49a, 50a, ¶17.

4. PSO submitted its case to the state district court on the theory that Willis had no right to contest the taking of its property and PSO introduced no evidence whatsoever utterly failing to meet its original burden of proof and make out a prima facie case of public use. App. M at 44a, ¶5, 49a, ¶15.

5. Willis submitted to the state court that PSO had failed to make out a prima facie case so PSO could not prevail and the case must be dismissed. App. M at 44a, ¶4.

Had Willis received the equal protection of the law PSO's condemnation action would have been dismissed when PSO submitted it to the state district court for adjudication on January 27, 1994, as PSO failed to overcome the presumption in Willis' favor that the taking was not for a public use.

As such non-public use is a violation of the Fourteenth Amendment, Willis is entitled to maintain a §1983 action to halt the illegal use of the property and to recover damages for the unlawful appropriation. The Tenth Circuit holding that Willis is restricted to maintaining a state action for just compensation directly contradicts the holdings of this Court in Hawaii Housing Authority v. Midkiff, supra and the numerous cases cited therein.

ARGUMENT 2

There is a procedural due process right to a predeprivation hearing on public use when a private condemnor files condemnation proceedings in state court against private property.

The Court of Appeals held in its opinion "that predeprivation hearings are not constitutionally required in the eminent domain context." App. A at 6a. In fact, the decisions of this Court clearly require an opportunity for a predeprivation hearing on public use, particularly when the condemnor is a private corporation.

It has long been a constitutional rule that private property can only be condemned for a public use. Hawaii Housing Authority v. Midkiff, supra, and cases cited therein.

As public use is a judicial issue, Sears v. City of Akron, 246 U.S. 242, 251, 38 S.Ct. 245, 248, (1918), if the right to a judicial review of the public use of a taking "is to serve its full purpose then it is clear it must be granted at a time when the deprivation can still be prevented." Fuentes v. Shevin, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994 (1972).

In the case of Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex. 1974) Aff'd 419 U.S. 1042, 95 S.Ct. 614

(1974) the court held:

> "The power of eminent domain, however, does not require a balancing of interests, for the power has only two restrictions: that the condemnation be for a **public purpose** and that just compensation be paid...Condemnation, however, is for the general **public**---a criteria easily **tested** in the district court **before a loss of possession**..." Joiner at 774 (emphasis added)

The reason that a landowner's challenge to public purpose must be adjudicated predeprivation is obvious.

As the Oklahoma Supreme Court observed:

> Manifestly, cases might arise where possession by the condemnor would be tantamount to destruction as far as the landowner is concerned. In such cases, denial of a tribunal in which to test the right to condemn prior to possession, would be a denial of equal protection of the laws. Wrightsman v. Southwestern Natural Gas Company, 46 P.2d 925, 929 (Ok 1935)

In Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975 (1990) this Court held:

> "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." Zinermon, 494 U.S. at 132, 110 S.Ct. at 987

In 1993, in a condemnation case, the Eighth Circuit held:

> "Here the State could and in fact did afford Hroch a predeprivation remedy designed to protect his interest as the owner of property sought to be condemned...After Zinermon v. Burch,***we think it clear that the constitutional adequacy of this predeprivation remedy may be challenged under §1983, regardless of whether a post deprivation remedy is also available." Hroch v. City of Omaha, 4 F.3d 693, 695 (8th Cir. 1993)

This Court has always been quite specific when property is physically taken through court proceedings:

> **"The right of a citizen to defend his property against attack in a court is corollary to the plaintiffs' right to sue there."** Degen v. United States, 517 U.S. 820, 826, 116 S.Ct. 1777, 1783 (1996). (Emphasis added)

Over a century earlier this Court emphatically held:

> "In our judgement the District Court committed a serious error...The order in effect denied the respondent a hearing...**If assailed there, he could defend there**. The liability and the right are inseparable. McVeigh v. United States, 78 U.S. 259, 267 (1870) (Emphasis added)

If a private condemnor can file condemnation proceedings in state court and take possession without permitting the landowner a predeprivation hearing on public

use the condemnor is doing what this Court has long held due process forbids: attacking a citizen's property in court while denying the property owner the opportunity to defend, Degen v. United States, supra, and taking private property by eminent domain for a private use. Hawaii Housing Authority, supra.

This Court has repeatedly held that:

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." To one who protests against the taking of his property without due process of law, it is no answer to say in his particular case due process of law would have led to the same result because he had no adequate defense on the merits." Fuentes v. Shevin, 407 U.S. 67, 87, 92 S.Ct. 1983, 1997, (1972); Coe v. Armour Fertilizer Works, 273 U.S. 413, 424, 35 S.Ct. 625, 629, (1915).

In U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492 (1993), this Court addressed the constitutionality of the forfeiture of real property belonging to a convicted drug dealer. The Court found a violation of the Due Process Clause because of the lack of a predeprivation hearing. This Court rejected claims that no due process violation occurred because a predeprivation hearing would have made no difference, noting:

> "Fair procedures are not confined to the innocent. The question before us is the legality of the seizure not the strength of the government's case." U.S. v. James Daniel Good Real Property, 510 U.S. at 62, 114 S.Ct. at 505.

In the case at bar, the Oklahoma Supreme Court has held that Willis' constitutional and statutory rights were violated by PSO taking possession of Willis' property without Willis receiving any meaningful opportunity for a hearing and that the appropriation of Willis' property is deemed for a private use. As a result, Willis was deprived of property without procedural or substantive due process in violation of the Fourteenth Amendment and is entitled to maintain a §1983 action to halt the illegal use of the property and to recover damages for the unlawful deprivation.

ARGUMENT 3

Property owners may maintain actions in federal court under 42 U.S.C. §1983 against parties who seize their property by subverting the judicial process.

Willis has asserted a §1983 claim against PSO for seizing Willis' property by virtue of a now reversed court order obtained by subverting the judicial process. Willis alleges that the judicial process was subverted by persuading the state district judge to exercise his jurisdiction corruptly and by filing with the state court and sending through the U.S. Mail a document which was an altered corporate record falsely attested to under penalty of perjury.

The Tenth Circuit's opinion dismisses this claim on the grounds that the federal courts lack subject matter jurisdiction because Willis must first seek "just compensation" through a state court preceding. This holding directly conflicts with a decision of this Court.

In 1980 this Court issued its opinion in Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, (1980) wherein the Court affirmed the Fifth Circuit decision holding that the plaintiff, in a §1983 action, had pled a cause of action for the

taking of property without due process of law. In its opinion the Court stated:

> ...we agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of **providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.** Dennis v. Sparks, 449 U.S. at 31, 32, 101 S.Ct. at 188 (emphasis added)

For the judicial process to be subverted, it is not necessary that the judge be bribed. It is sufficient if the judge was "persuaded" to exercise his jurisdiction corruptly. Dennis v. Sparks, 101 S.Ct. at 186.

This Court has long held that due process requires a neutral and detached adjudicator in the first instance and that even appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator. Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust For Southern California, 508 U.S. 602,617, 618, 113 S.Ct. 2264, 2277 (1993)

When a party persuades a judge to exercise his jurisdiction corruptly, that party has violated the opposing party's due process right to a neutral and detached adjudicator.

PSO has repeatedly acknowledged that it appropriated the use of Willis' property pursuant to the order the state district court issued holding that Willis had no right to contest the taking of its land after the state judge admitted Willis had such a right.

The Oklahoma Supreme Court has now established that the court order pursuant to which PSO and BN have appropriated the use of Willis' property violated Willis' constitutional and statutory rights (App. M at 43a, ¶1.) and was issued at the behest of PSO. (App. M at 44a, ¶¶4 & 5.)

In other words, PSO "persuaded" the state district judge to violate Willis' constitutional and statutory rights. The record of the state court proceedings substantiates that those violations were intentional and corrupt, not merely erroneous.

The Tenth Circuit opinion now holds that Willis' sole remedy for having PSO take its property by subverting the state district court is to go back to that same subverted court and seek "just compensation" for the acts of the court in collusion with PSO.

Such a ruling, in addition to being inherently absurd, directly contradicts the holding of this court in Dennis v. Sparks, supra.

ARGUMENT 4

When violations of multiple specific constitutional protections are alleged in an action brought under 42 U.S.C. §1983, a federal court may not base its decision on what it defines as "the predominant claim."

The Tenth Circuit Court of Appeals decision states:

> More to the point here, this ripeness rule encompasses other constitutional claims which fall squarely within the primary purview of the JCC in this context, such as the due process, equal protection, and access-to-courts

> infirmities plaintiff alleges with respect to the state eminent domain proceeding.***Thus, pursuit of such closely-related objections must await the ripening of the predominant JCC claim. Id. App. A at 5a.

The Court of Appeals swept aside Willis' §1983 claims for violation of specific constitutional protections by asserting that these claims could not be presented until a just compensation claim was ripe because it was the "predominant" claim.

In U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492 (1993), this Court noted that it had rejected the view that the applicability of one constitutional amendment preempts the guarantees of another. Citing to its earlier decision of Soldal v. Cook County, 506 U.S. 56, 70, 113 S.Ct. 538, 548, (1992), the Court noted that certain wrongs can affect more than a single right and accordingly implicate more than one of the constitution's commands. "When such multiple violations are alleged we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn." U.S. v. James Daniel Good Real Property, 510 U.S. at 49, 50, 114 S.Ct. at 499. The Court then further noted that the proper question is not which amendment controls, but whether any amendment is violated.

ARGUMENT 5

A property owner is not required to seek "just compensation" in state court before bringing an action in federal court under 42 U.S.C. §1983 for violation of specific constitutional protections.

Willis has alleged that the acts of PSO and BN in

seizing and utilizing Willis' property violate Willis' federally protected rights to access to the courts, equal protection of the law and due process of law.

The First Amendment protects a citizen's right to petition for a redress of grievances. In California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 612 (1972), this Court stated:

> Certainly the right to petition extends to all departments of government. The right of access to the courts is indeed but one aspect of the right to petition.

Thus each of these constitutional claims relating to the seizure of Willis' property is based on a "particular constitutional provision" as opposed to a claim to "a generic right" grounded in "basic principles of §1983 jurisprudence". Graham v. Connor, 490 U.S. 386, 393 (1989), 109 S.Ct. 1865, 1870 (1989)

The Tenth Circuit dismissed each of these claims with the following holding:

> More to the point here, this ripeness rule encompasses other constitutional claims which fall squarely within the primary purview of the JCC in this context, such as the due process, equal protection, and access-to-courts infirmities plaintiff alleges with respect to the state eminent domain proceeding.***Thus, pursuit of such closely-related objections must await the ripening of the predominant JCC claim. Id. App. A at 5a.

This holding directly repudiates numerous holdings of this Court and rejects the very purpose for which §1983 was enacted.

This Court has repeatedly held that §1983 was intended to provide plaintiffs with immediate access to the federal courts when their federally protected rights were violated.

"As we recognized in Mitchum v. Foster...'the very purpose of §1983 was to interpose the federal courts between the States and the people as guardians of the peoples' federal rights--to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative or judicial'...The 1971 Congress intended ¶1 to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights...and to provide these individuals **IMMEDIATE ACCESS** to the federal courts notwithstanding any provision of state law to the contrary." Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 503, 504, 102 S.Ct. 2557, 2561 (1982). (Emphasis added)

See also Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 1589 (1997).

This Court has repeatedly and consistently held that §1983 was intended to provide a remedy for violations of civil rights where state law was inadequate and also to provide a federal remedy where the state remedy was adequate in theory but was not available in practice. The Court has stated on more than one occasion:

> "It is no answer that the state has a law which enforced would give relief. The federal

> remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the Federal one is invoked."

Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 481 (1961); Zinermon v. Burch, 494 U.S. 113, 124, 110 S.Ct. 975, 982 (1990).

In Zinermon v. Burch, 494 U.S. at 125, 110 S.Ct. at 983 (1990) this Court gives a comprehensive discussion of the grounds for bringing a §1983 action. Citing back to Monroe v. Pape, supra, this Court observed that in many cases-as in the case at bar-there is no quarrel with the state laws on the books. Instead, the problem is with the way those laws are or are not implemented by state officials. This Court then discussed the nature of substantive violations such as violations of specific constitutional protections and states:

> "As to these two types of claims, the constitutional violation actionable under §1983 is complete when the wrongful action is taken." Zinermon v. Burch, 494 U.S. at 125, 110 S.Ct. at 983.

Willis has asserted §1983 claims against BN and PSO for violation of Willis' First Amendment right of access to the courts and Fourteenth Amendment right to equal protection-specific protections under the Constitution. All were actionable when the constitutional violations occurred. Any future proceedings in the state condemnation action are irrelevant to the merits of these claims.

The fact that the underlying state proceeding between PSO and Willis is an eminent domain proceeding is of no consequence. In County of Allegheny v. Frank Mashuda Company, 360 U.S. 185, 79 S.Ct. 1060, (1959), this Court

noted that promptness of decision is one of the elements of justice and held that Federal Courts should apply settled state law without abstaining from the exercise of jurisdiction even though this course would require decision of difficult federal constitutional questions. The Court specifically stated:

> "But the fact that a case concerns a state's power of eminent domain no more justifies abstention than the fact it involves any other issue related to sovereignty." County of Allegheny, 360 U.S. at 191, 192, 79 S.Ct. at 1064.

The Tenth Circuit attempts to base its claim of lack of ripeness on this court's decision in Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108 (1985).

The decision in Williamson focused on a very narrow issue: "Whether Federal, State, and Local governments must pay money damages to a landowner whose property has been "taken" temporarily by the application of government regulations." Williamson, 473 U.S. at 185, 105 S.Ct. at 3115.

In the case at bar the property has not been taken by government regulation nor by Federal, State or local governments. The property has in fact been physically taken after subverted judicial proceedings by two private profit making corporations.

This Court has long made clear and major distinctions between "regulatory takings" and actual physical invasions. Yee v. City of Escondido, California, 503 U.S. 519, 112 S.Ct. 1522 (1992); Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 102 S.Ct. 3164, (1982);

Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 (1979).

In Williamson County, this Court expressly distinguished procedural due process claims from taking claims, stating that due process may be violated regardless of the availability of postdeprivation remedies. See 473 U.S. at 195-96 N. 14, 105 S.Ct. at 3121 N 14.

As previously noted, in Zinermon v. Burch, 110 S.Ct. at 987, 494 U.S. at 132, this Court held:

> "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking."

As the Ninth Circuit noted in Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989), the just compensation clause "has no application to other types of constitutional claims, even where those claims arise out of facts that also give rise to a taking claim. Thus, the rationale for requiring exhaustion of state compensation remedies in taking cases does not extend to a claim that plaintiffs were denied due process."

In fact, the "JCC" is irrelevant to this case. As previously noted, Justice Stevens stated in his concurring opinion in Williamson County, supra, there are some actions affecting private property that are "impermissible even if the government is willing to pay for them." Williamson County, 473 U.S. at 202, 105 S.Ct. at 3124, 3125, 473.

If the decision of the Tenth Circuit is allowed to stand, §1983 will have been effectively repealed in the Tenth Circuit

as the decision requires plaintiffs to first seek compensation through state court proceedings before seeking relief under §1983 for violation of specific constitutional protections. This is particularly egregious in the case at bar where the violation of Willis' constitutional rights occurred with the collusion and participation of the state district court. This Court has recognized that §1983 was enacted to deal with this very situation.

In Monroe v. Pape, supra, this Court noted that one of the reasons §1983 was enacted was the failure of the state courts to enforce the law with an equal hand.

In Mitchum v. Foster, 407 U.S. 225 (1972),92 S.Ct. 2151, this Court quoted extensively from the Congressional record and history of the statute codified today as §1983:

> Proponents of the legislation noted that **state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.** 92 S.Ct. at 2161, 407 U.S. at 240. (Emphasis added)

In 1959, this Court held:

> Against this background two protections emerge from the broad constitutional proscription of official invasion. The first of these is...the right to shut the door on officials of the state unless their entry is under proper authority of law. Frank v. State of Maryland, 359 U.S. 360, 79 S.Ct. 804, 808, (1959)

Justice Frankfurter, who wrote the majority opinion in Frank, wrote a dissenting opinion where he cited to Frank in Monroe v. Pape, 81 S.Ct. at 496:

> The essence of the liberty protected by the common law and by the American constitutions was "the right to shut the door on officials of the state unless their entry is under proper authority of law."

The invasion of Willis' property has been held to be not under proper authority of law. Willis is not required to accept just compensation. Willis is entitled to bring a §1983 action and shut the door on BN's recurring unconstitutional invasions of Willis' property.

ARGUMENT 6

Federal courts are required to follow state law as pronounced by the State Supreme Court and conform their decisions to the latest decision of the State Supreme Court

The Tenth Circuit decision rejects both Willis' §1983 claims and its trespass claim in part by asserting that under Oklahoma eminent domain law condemnors may take possession of the property sought to be condemned upon payment of the assessed value of the property and that the Oklahoma Supreme Court has accepted the "legislative authorization of immediate possession" and found it permissible in that such possession remains subject to review and potential restraint through the courts equitable power. App. A at 7a.

These assertions are utterly false and reflect a complete refusal to follow state law as pronounced by the Oklahoma Supreme Court.

It is a bedrock principle of American jurisprudence that Federal Courts must follow state law as pronounced by the State Supreme Court. Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, (1938). Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S.Ct. 347, 350 (1941).

Until the case at bar, the decisions of the Tenth Circuit were entirely consistent with this requirement. In Chicago Rock Island & Pacific R.R. v. Hugh Breeding, Inc., 247 F.2d 217 (10th Cir. 1957), the Court held:

> "And where, as in the instant case, the question decided was one of state law, with respect to which the federal courts are bound to follow the decisions of the courts of the state, and where subsequent to the decision of the federal court, the supreme court of the state has rendered a decision at variance with that of the federal court, it is the duty of the federal court that still has jurisdiction of the case to conform its decision and judgment to the latest decision of the supreme court of the state."

As previously noted this Court in addressing rights under state eminent domain law stated:

> With respect to such rights, **we have held the law of the State as declared by its Supreme Court is controlling...** (Emphasis added) Kaukauna Water Power Company v. Green Bay and Mississippi Canal Company, 12 S.Ct. at 177.

Oklahoma eminent domain law is based on three (3) sources of law, the Oklahoma Constitution, the Oklahoma

Statutes at 66 O.S. §51 et. seq. and the decisions of the Oklahoma Supreme Court interpreting the Constitution and statutes.

The Oklahoma eminent domain statutes are essentially unchanged from when they were first enacted by the territorial legislature in 1890. With respect to the rights of landowners the statutes only address the right to compensation.

While the statutes do not address a landowner having a right to a predeprivation hearing on the public use of a proposed taking, over the years the Oklahoma Supreme Court by judicial construction has established procedures in eminent domain proceedings to permit a landowner to challenge the taking of land by a condemnor. In Wrightsman v. Southwestern Natural Gas Co., 46 P.2d 925, 932 (Okl. 1935) the Oklahoma Supreme Court noted, "...the power to determine questions relating to the right to condemn in condemnation proceedings arises in this state from judicial construction rather than specific statutory authority." As a result, in terms of Oklahoma eminent domain law the statutes are merely "the tip of the iceberg."

The Oklahoma Supreme Court reiterated many of its earlier holdings concerning the rights of landowners in its decision in PSO v. Willis, supra. In the opening paragraph the Supreme Court held:

> Certiorari was granted in this eminent domain proceeding to consider a landowner's contention that his constitutional and statutory rights were violated as he was denied any meaningful opportunity for a hearing before Public Service Company was allowed to...take possession of his land. We agree. App. M at 43a, ¶1.

In fact, 66 O.S. §53(c), the statute cited in the Panel decision is irrelevant to Willis §1983 claims. In Town of Ames v. Wybrandt, 220 P.2d 693 (Okl. 1950), the Oklahoma Supreme Court specifically addressed §53(c) and held that it and the cases construing it did not apply when the right to take was at issue and further held at 695:

> "Therefore, the establishment of the right to condemn is a **PREREQUISITE TO ANY RIGHT OF POSSESSION** by the condemnor." (Emphasis added)

As the Oklahoma Supreme Court held in PSO v. Willis, supra:

> "Before an entity having eminent domain authority can appropriate private land to its use, **ALL THE STEPS LEGALLY REQUISITE MUST HAVE BEEN TAKEN**."..."Willis is correct. He was wrongfully denied an opportunity to challenge PSO's asserted but **UNPROVEN RIGHT TO TAKE** his property as well as the right to conduct discovery." (Emphasis added) App. M at 50a, 51a, ¶¶17, 21

Obviously, if PSO failed to prove its right to take Willis' property all of the steps legally requisite were not taken, and PSO has no right to appropriate the use of the property.

Indeed, in a later decision in the same case the intermediate Oklahoma Court of Civil Appeals explicitly stated:

> In June, 1997, the Oklahoma Supreme Court

> issued an opinion on certiorari to review this court's 1995 opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for hearing **before PSO could** condemn and **occupy the property**...(Emphasis added) App. N at 54a

So well developed is Oklahoma case law in this area that over 80 years ago the Oklahoma Supreme Court held:

> "Section 24, Art. 2 of the Constitution, prescribes in general the method of condemnation and must be strictly observed when the right of eminent domain is invoked. The section reads:
>
> '...In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.'
>
> It would follow that any attempt...to appropriate private land...contrary to such constitutional provision would be **VOID though under the color of statutory authority.**" (emphasis added) Watkins v. Board of Commissioners, 174 P. 523, 524 (Okl. 1918)

Even the U.S. District Court has explicitly conceded in this case:

> The holding of the Supreme Court of Oklahoma establishes that the actions of the district court were in violation of Okla. Const., ¶¶23, 24 and Okla. Stat. tit. 66, ¶53.

> The decision did not involve the constitutionality of Okla. Stat. tit. 66, ¶53. It addressed the failure of the lower courts to follow the established statutory process. App. H at 24a.

Since the Oklahoma Supreme Court has held that PSO's appropriation of Willis' property without a meaningful hearing to adjudicate the public use of the taking violated Willis' "constitutional and statutory rights", the Tenth Circuit was clearly refusing to follow state law as pronounced by the Oklahoma Supreme Court when the Court of Appeals held that PSO was lawfully in possession of Willis' property under Oklahoma eminent domain law.

This in turn establishes that the decision of the Court of Appeals is in violation of the decisions of this Court that federal courts must conform their decisions regarding state law to the latest decision of the highest court of the state-PSO v. Willis, supra.

CONCLUSION

The Court of Appeals' decision in this case directly contradicts the holdings of this Court in numerous cases cited herein and completely eviscerates 42 U.S.C. §1983. In addition the decision blatantly misstates Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court.

The Petition for a Writ of Certiorari should be granted. Otherwise, the precedential value of this Court's decisions will be called into question and the principle that all citizens stand equal before the law will have been severely compromised.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed: May 27, 1999]

No. 97-5107
(D.C. No. 96-CV-59-E)
(N.D. Okla.)

B. Willis, C.P.A., Inc., *Plaintiff-Appellant*,	)
v.	)
Public Service Company of Oklahoma, an Oklahoma Corporation; Burlington Northern and Santa Fe Railway Company, a foreign corporation, *Defendants-Appellees*.	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before TACHA and BALDOCK, Circuit Judges, and GREENE,** Senior District Judge.

The panel previously abated this appeal in deference to related state court eminent domain proceedings which might have obviated or perhaps clarified some of the issues raised in the case. However, timely resolution of the state action has not ensued. After making its way through the Oklahoma appellate courts, that proceeding is now back in the trial court awaiting redetermination.

Upon further review of the record on appeal, the briefs, and the parties' subsequent submissions, the panel concludes that proper grounds for immediate disposition of the appeal are present but have been obscured by the presence of many overlapping/redundant claims which are not ripe for adjudication. For reasons explained below, we affirm the decision of the district court, though we clarify that the dismissal of the bulk of this case, which is dictated by constitutional constraints on subject matter jurisdiction, is without prejudice.

Background

Oklahoma's statutory scheme for eminent domain, Okla. Stat. Ann. tit 66, §§ 51-66, authorizes railroad

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** Honorable J. Thomas Greene, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

corporations (and utilities, see Okla. Stat. Ann. tit 27, § 7) to take real property by condemnation. The procedure may be outlined in pertinent part by the following steps: (1) the condemnor corporation applies to the district judge, with notice to the landowner, for selection of a three-person commission; (2) the commissioners inspect the property, assess just compensation for the injury involved, and file a report with the clerk of the court, which is promptly forwarded to interested parties; (3) if the condemnor pays the assessed sum, it may take immediate possession consistent with its proposed use, though all parties retain the right to challenge the commission's report; (4) review may be sought in the district court by filing written exceptions to the report or a demand for jury trial; (5) the district court's final judgment (approving compensation or denying condemnation) is subject to appeal, but such review shall not delay the condemnor's use of the property, if approved, so long as the assessed compensation has been paid.

Defendant Public Service Company of Oklahoma (PSO) commenced an eminent domain proceeding to condemn and acquire an easement over plaintiff's property to build a railroad spur for transporting coal to one of its power plants. After the first three steps of the process were concluded, plaintiff sought review in state court both by exception and jury demand, alleging that the proposed taking was not for a public use nor reasonably necessary for the use claimed. Plaintiff also challenged the amount of compensation assessed. The trial court ruled in favor of PSO, and plaintiff appealed. He also sought interim equitable relief from the Oklahoma Supreme Court, which denied his requests. While the appeal was pending, PSO completed the railroad spur and put it in

use (particularly by defendant Burlington Northern Railroad Company (BN), as PSO's licensee). When plaintiff threatened to interfere with the operation, PSO obtained an injunction against him. Ultimately, the Oklahoma Supreme Court reversed the judgment of condemnation, holding that the trial court had erroneously relieved PSO of the initial burden of proof and compounded that error by denying plaintiff discovery of pertinent materials. See Public Serv. Co. v. B. Willis, C.P.A., Inc., 941 P.2d 995 (Okla. 1997). On remand, the state trial court refused to dissolve the existing injunction against plaintiff's interference with PSO's operation, and the Oklahoma appellate courts have affirmed that ruling. However, the trial court has yet to issue any final decision on the merits of the condemnation.

In the meantime, plaintiff filed these proceedings in federal district court, alleging numerous constitutional claims against PSO under 42 U.S.C. § 1983 and a trespass claim against BN. The district court identified the crux of the case to be plaintiff's assertion that he was constitutionally entitled to a final judicial determination on condemnation before PSO could take possession of the easement over his property. In the. district court's view, no federal right was implicated under the circumstances and, consequently, PSO's current possession, and BN's licensed use, was not actionable.

On this appeal, plaintiff continues to argue that the state condemnation proceedings are constitutionally invalid, violating his rights to due process, equal protection, access to the courts, and free speech. He also claims that, as PSO could not have acquired a valid right to possession through such proceedings, BN has no derivative licensee defense to the

trespass claim. Finally, he contends that the state court order enjoining his interference with PSO's operations violates his First Amendment right of free speech. We conclude that most of these claims are not ripe for adjudication, and the remainder lack merit. Accordingly, we affirm the district court's decision dismissing the case.

Ripeness

Virtually all of plaintiff's complaints derive, in one way or another, from the eminent domain proceeding prosecuted by PSO. As outlined above, that proceeding affords plaintiff the right to challenge both the justification of PSO's taking and the adequacy of any resulting compensation. See generally Okla. Stat. Ann. tit 66, §§ 51-57. Thus, until that proceeding is concluded, any objections he may have cognizable under the most directly pertinent provision of the federal Constitution--the Just Compensation Clause (JCC)--are not ripe for adjudication and must be dismissed for lack of subject matter jurisdiction under Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-96 (1985). More to the point here, this ripeness rule encompasses other constitutional claims which fall squarely within the primary purview of the JCC in this context, such as the due process, equal protection, and access-to-courts infirmities plaintiff alleges with respect to the state eminent domain proceeding. See Bateman v. City of West Bountiful, 89 F.3d 704, 709 (10th Cir. 1996) (collecting numerous Tenth Circuit cases). Thus, pursuit of such closely-related objections must await the ripening of the predominant JCC claim. Id.

However, one condemnation-related claim here clearly falls outside the Williamson bar. In addition to the objections to his own proceeding, plaintiff appears to raise a generalized facial challenge to the state eminent domain scheme itself, for permitting any condemnor to take immediate possession upon payment of an administratively-determined compensation before final judicial resolution of the landowner's objections, see Okla. Stat. Ann. tit 66, § 53(C). While an objection to the taking "as applied to [plaintiff's] property would be unripe [under Williamson]," such a "facial challenge to the [statutory scheme]" is immediately adjudicable. See Yee v. City of Escondido, 503 U.S. 519, 533-34 (1992).

This evidently was, in fact, the claim addressed by the district court, which held that predeprivation hearings are not constitutionally required in the eminent domain context. We agree. In addition to the authorities the district court discussed, we note the Supreme Court specifically stated in Williamson that "[u]nlike the Due Process Clause . . . the Just Compensation Clause has never been held to require pretaking process or compensation." Williamson, 473 U.S. at 195 n. 14 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984)); see also J. B. Ranch, Inc. v. Grand County, 958 F.2d 306, 309 & n.4 (10th Cir. 1992) (quoting Williamson and rejecting due process claim based on asserted need for pretaking hearing in this context as "impos[ing] new and potentially inconsistent obligations" beyond those required by JCC). Indeed, this was a premise for the Williamson Court's ripeness analysis: "[B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until

the State fails to provide adequate compensation for the taking." Williamson, 473 U.S. at 195; see also Biddison v. City of Chicago, 921 F.2d 724, 727 n.4 (7th Cir. 1991).

This point is obscured somewhat by decisions of the Oklahoma Supreme Court which, while not holding the eminent domain scheme (particularly the immediate-possession provision of § 53(C)) invalid, have broadly stated that "the establishment of the right to condemn is a prerequisite to any right of possession by the condemnor." Town of Ames v. Wybrant, 220 P.2d 693,695 (Okla. 1950) (citing Watkins v. Board of Comm'rs, 174 P. 523,525 (Okla. 1918)). However, a wider view of the case law harmonizes the supreme court's language with its evident acceptance of § 53(C). Thus, the legislative authorization of immediate possession is permissible *in that* such possession *remains subject to review and potential restraint* through the courts' equitable power: "According to Wybrant and Watkins, a public body having the power of condemnation *can be enjoined* from appropriating private property for public use until it has initiated condemnation proceedings and had its right to condemn the property finally determined." City of Bartlesville v. Ambler, 499 P.2d 433, 436 (Okla. 1971) (emphasis added); see Wybrant, 220 P.2d at 696 (noting that *"upon proper application and showing* [by the landowner]" the trial court *"could make an order temporarily restraining* the condemnor from taking possession of the land pending final determination of the right to condemn" (emphasis added)); Wrightsman v. Southwestern Natural Gas Co., 46 P.2d 925,933 (Okla. 1935) (same). Indeed, plaintiff has taken the opportunity to seek equitable relief in the state proceedings; he has just not persuaded the Oklahoma courts

that it is warranted in his case. Thus, the state courts' construction and assessment of the eminent domain scheme is consistent with applicable federal precedent, and neither of these bodies of authority support plaintiff's position that the scheme is invalid.

Freedom of Speech

Plaintiff's First Amendment claim, which challenges a collateral order on a basis substantively independent of the condemnation process itself, appears also to fall outside the Williamson ripeness bar. Compare Landmark Land Co. of Okla., Inc. v. Buchanan, 874 F.2d 717, 723 (10th Cir. 1989) (holding intangible due process right that was substantively distinct from JCC protections was not subsumed under Williamson ripeness rule), with J. B. Ranch, Inc., 958 F.2d at 309 (holding Williamson applicable to due process claim that fell squarely within compass of JCC protections). However, we hold that dismissal of the claim was warranted in any event.

The target of the claim is the state trial court's order enjoining plaintiff "from directly or indirectly interfering in any manner with the construction, maintenance and operation of [PSO's] railroad spur." Appellants' Supp. App. at 21. There is nothing facially speech-sensitive about this order, nor does plaintiff cite any authority that would support such a claim. Actually, plaintiff is primarily concerned with a contempt proceeding brought to enforce the injunction after this appeal was filed. In that proceeding, which has not been concluded, PSO seeks to hold plaintiff in contempt for sending a letter to BN admonishing that, in light of the

Oklahoma Supreme Court's reversal of PSO's condemnation order, plaintiff "is restoring [his] fence line around [the disputed easement] and posting 'NO TRESPASSING' signs." Id. at 22. Whether plaintiff has a cognizable claim under the First Amendment on this basis is not a question properly before this panel.

Trespass

The district court explained that its rejection of plaintiff's constitutional challenges to the eminent domain proceedings mooted any remaining claims and, accordingly, dismissed the entire case. As plaintiff recognizes, his claim against BN for trespass obviously stands or falls with the legitimacy of the eminent domain proceeding from which the railroad derives its status as licensee. Since any further challenges to that proceeding are not currently ripe for adjudication, the district court's dismissal of the action should be affirmed.

State Proceedings - Status Reports

Status reports submitted by plaintiff reflect some unfavorable rulings issued in the ongoing eminent domain proceedings. In particular, plaintiff complains of the Oklahoma Supreme Court's March 22, 1999 denial of his mandamus petition seeking to disqualify the state trial judge, and the May 4, 1999 denial of certiorari in his interlocutory appeal from the trial court's refusal to dissolve the order enjoining interference with PSO's operations. For the same reasons expressed above in connection with plaintiff's challenge to the eminent domain proceeding as a whole, these

particular objections to specific rulings therein are not ripe for consideration. Further, if a particular ruling were somehow sufficient to give rise to a distinct, immediately actionable constitutional wrong, at this point such a claim would most appropriately be brought in district court, not interjected into this pre-existing appeal.

Conclusion

Accordingly, we affirm the district court's dismissal of this action. We clarify, however, that the disposition of plaintiff's numerous unripe claims, based on the lack of subject matter jurisdiction, is without prejudice. See Bateman, 89 F.3d at 706.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED. All pending motions are denied as moot.

Entered for the Court

Deanell Reece Tacha
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: March 2, 1999]

No. 97-5107

B. Willis, C.P.A., Inc.,
Plaintiff-Appellant,

v.

Public Service Company of Oklahoma, an Oklahoma Corporation; Burlington Northern and Santa Fe Railway Company, a foreign corporation,
Defendants-Appellees.

ORDER

Before TACHA and BALDOCK, Circuit Judges and GREENE,* District Court Judge.

* The Honorable J. Thomas Green, Senior District Court Judge for the District of Utah, sitting by designation.

Upon review of the status report filed by the appellant on February 12, 1999, this case remains abated.

The parties of this appeal are to notify this court immediately once the petition for certiorari has been acted upon in the Oklahoma State Supreme Court.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: December 15, 1998]

No. 97-5107

B. Willis, C.P.A., Inc.,
Plaintiff-Appellant,

v.

Public Service Company of Oklahoma, an Oklahoma Corporation; Burlington Northern and Santa Fe Railway Company, a foreign corporation,
Defendants-Appellees.

ORDER

Before TACHA and BALDOCK, Circuit Judges and GREENE,* District Court Judge.

This matter is before the court on appellant's status

* The Honorable J. Thomas Green, Senior District Court Judge for the District of Utah, sitting by designation.

report filed November 2, 1998. Within 60 days of the date of this order or immediately upon conclusion of the state court proceedings, whichever occurs first, appellant shall file a status report with this court regarding state court proceedings.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: September 1, 1998]

No. 97-5107

B. Willis, C.P.A., Inc.,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Public Service Company of	)
Oklahoma, an Oklahoma Corporation;	)
Burlington Northern and Santa Fe	)
Railway Company, a foreign corporation,	)
Defendants-Appellees.	)
	)

ORDER

Before TACHA, and BALDOCK, Circuit Judges, and GREENE,* District Judge.

* The Honorable J. Thomas Greene, Senior District Judge for the District of Utah, sitting by designation.

Tenth Circuit Court of Appeals
Order - September 1, 1998

This matter is before the court on (a) appellant's petition for rehearing *en banc,* filed July 16, 1998; (b) motion for extension of time to respond to appellants petition for rehearing *en banc,* submitted by appellees Burlington Northern and Santa Fe Railway Company, and Public Service Company of Oklahoma; (c) appellant's application for injunction pending appeal, filed July 22, 1998; and (d) the motion for extension of time to respond to appellant's motion for injunction pending appeal, submitted by appellee Burlington Northern and Santa Fe Railway Company.

This appeal concerns whether certain condemnation procedures afforded appellant the protection of federal constitutional fights. On July 8, 1998, this court abated the appeal pending completion of state court proceedings. Appellant filed a status report on July 22, !998, notifying the court that the matter has been assigned to the Oklahoma Court of Civil Appeals, and is still pending.

The motions for extension of time, designated as items (b) and (d) above, are granted. Appellees' responses to appellant's petition for reheating *en banc* and appellant's application for injunction pending appeal, as well as appellant's reply to appellees' response to the application for injunction for injunction pending appeal have been considered by the court.

Appellant's motion for injunctive relief is duplicative of an application for injunctive relief previously filed in this court and denied. B. Willis, C.P.A., Inc. v. Burlington N. R.R. Co., et al., No. 97-5107, Order (10th Cir. Sept. 17, 1977). Appellant's emergency motion for reconsideration of

this denial of injunctive relief was also denied. Id., Order (Sept. 24, 1997). Appellant's July 22, 1998, application for injunction pending appeal is denied as moot in light of the court's previous denial of application for the same relief in this matter.

Appellant's petition for rehearing *en banc* is also denied. Appellant has brought issues to appeal in this court which are currently under proper consideration in the Oklahoma state courts. This appeal will remain in abatement until such time as the Oklahoma courts have disposed of the state court proceedings. Appellant shall submit a status report to this court 60 days from the date of this order or immediately upon the conclusion of the state court proceedings, whichever occurs first.

Entered for the Court
PATRICK FISHER, Clerk of Court

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: July 8, 1998]

No. 97-5107

(D. Ct. No. 96-CV-59-E)

B. Willis, C.P.A., Inc.,
Plaintiff-Appellant,

v.

Burlington Northern Railroad Company, a foreign corporation: Public Service Company of Oklahoma, an Oklahoma Corporation
Defendants-Appellee.

ORDER

Before TACHA, and BALDOCK, Circuit Judges, and GREENE,* District Judge.

* The Honorable J. Thomas Greene, Senior District Judge for the District of Utah, sitting by designation.

Appellant's petition for rehearing is granted. Our order and judgment entered on June 17, 1998, was entered in error. The judgment is vacated. Rather, we abate this matter until the pending state court proceedings are complete. Appellant shall file a status report within 60 days of the date of this order apprising the court of the course of the those proceedings. If they conclude prior to that time counsel shall advise the court immediately.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed: June 17, 1998]

No. 97-5107
N.D. Okla.
(D. Ct. No. 96-CV-59-E)

B. Willis, C.P.A., Inc., *Plaintiff-Appellant*,	)
v.	)
Burlington Northern Railroad Company, a foreign corporation: Public Service Company of Oklahoma, an Oklahoma Corporation *Defendants-Appellee.*	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before TACHA, and BALDOCK, Circuit Judges, and GREENE, District Judge.[1]

We abstain from deciding the merits of this appeal until all the pending proceedings in state court are complete.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Circuit Judge

---

[1] The Honorable J. Thomas Greene, Senior District Judge for the District of Utah, sitting by designation.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: September 17, 1997]

No. 97-5107

B. Willis, C.P.A., Inc.,
Plaintiff-Appellant,

v.

Burlington Northern Railroad Company, a foreign corporation: Public Service Company of Oklahoma, an Oklahoma Corporation
Defendants-Appellees.

ORDER

Before PORFILIO and BALDOCK, Circuit Judges.

B. Willis, CPA, Inc., seeks an injunction pending his appeal of a district court judgment against him on claims against defendants brought pursuant to 42 U.S.C. § 1983 and state trespass law. We have carefully considered the appropriate factors, see 10th Cir. R. 8.1; McClendon v. City of Albuquerque, 79 F.3d 1014, 1020 (10th Cir. 1996),

together with the briefs and supporting materials filed by the parties. We conclude that plaintiff has not demonstrated irreparable harm such that damages are inadequate to compensate him for the injury he may have suffered, see Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986). Accordingly, plaintiff's application for an injunction pending appeal is denied.

Entered for the Court
PATRICK FISHER, Clerk

By /s/_____
Deputy Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed: November 3, 1997]

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

B. Willis, C.P.A., Inc.,
Plaintiff,

v.

Public Service Company of Oklahoma, an Oklahoma Corporation, and Burlington Northern Railroad Company, a foreign corporation:
Defendants.

ORDER

Entered: November 4, 1997

The Court, upon consideration of plaintiff's Motion filed under Authority of Fed. R.Civ. P. 60(b) to Vacate the Order Dated April 8, 1997, and the Judgment Dated May 13, 1997 (Docket #78), and upon consideration of the briefs and

arguments of the parties submitted upon the issues raised enters the following Order:

It is Ordered that plaintiff's 60(b) motion is denied. Plaintiff urges that this Court's ruling was based on a mistake of law, which law was substantially clarified on June 24, 1997 by the Supreme Court of the State of Oklahoma in its opinion in Public Service Company of Oklahoma v. B. Willis. C.P.A., Inc., No. 83,358. Plaintiff's position would have merit if the issues raised, presented, and addressed by the Supreme Court of Oklahoma were the same as the issues this Court addressed in its judgment and order. They are not the same.

The key issue before this Court was whether plaintiff's constitutional rights guaranteed by the Fourteenth Amendment were infringed by the state court in the condemnation proceedings. This Court stated in its Order, "Implicit in the issue before the court is the constitutionality of Okla. Stat.tit.66, §53(a), or its application in this case. With the issue framed in this manner, the Court finds that Willis does not have a constitutional right to a hearing prior to PSO taking a possessory interest in his land."

The holding of the Supreme Court of Oklahoma establishes that the actions of the district court were in violation of Okla. Const., §§ 23, 24 and Okla. Stat.tit.66, §53. The decision did not involve the constitutionality of Okla. Stat.tit.66, §53. It addressed the failure of the lower courts to follow the established statutory process. Plaintiff has full relief available to him upon remand to the state district court.

In light of this finding, the Court declines to request of the Court of Appeals that this case be remanded for further proceedings based upon the holding of the Supreme Court of the State of Oklahoma. Plaintiff's motion to vacate (Docket #78) is denied.

IT IS SO ORDERED THIS 31ST DAY OF OCTOBER, 1997.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed: May 12, 1997]

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

B. Willis, C.P.A., Inc.,
Plaintiff,

v.

Public Service Company of Oklahoma, an Oklahoma Corporation, and Burlington Northern Railroad Company, a foreign corporation:
Defendants.

JUDGMENT
Entered: May 13, 1997

In accordance with the Order filed April 7, 1997, the court grants Defendant Public Service Company of Oklahoma's Motion to Dismiss (Docket #9 in Case No. 96-C-172-E), which Motion was converted to a Motion for

Summary Judgment pursuant to Rule 12(c), Fed.R.Civ.P.; denies[1] Defendant Burlington Northern Railroad Company's Motion for Summary Judgment (Docket #20 in Case No. 96-C-59-E); denies Plaintiff's Motion for Partial Summary Judgment on the Issue of Liability of Burlington Northern Railroad Company to B. Willis, C.P.A., Inc. (Docket #11 in Case No 96-C-59-E); denies Plaintiff's Motion for Partial Summary Judgment on Issue of Liability on First Cause of Action for Violation of Constitutional Rights Under 42 U.S.C. §1983 (Docket #15 in Case N. 96-C-59-E); and Denies Defendant PSO's Motion for Sanctions (Docket No. 31 in Case No. 96-C-59-E). As a result of the adjudication of PSO's Motion to Dismiss, the Court enters judgment on the merits in favor of Defendants on all claims asserted against Defendants by Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendants Public Service Company of Oklahoma and Burlington Northern Railroad Company on all claims asserted against Defendants by Plaintiff, and that Public Service Company of Oklahoma's Motion for Sanctions against Plaintiff be denied.

IT IS SO ORDERED THIS 9TH DAY OF MAY, 1997.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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[1] In light of the ruling on the Motion to Dismiss, which disposes of all claims against all parties, the Court did not specifically consider the arguments in Burlington Northern's Motion for Summary Judgment. The Motion is therefore denied as moot.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed: May 12, 1997]

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

B. Willis, C.P.A., Inc.,
Plaintiff,

v.

Public Service Company of Oklahoma, an Oklahoma Corporation, and Burlington Northern Railroad Company, a foreign corporation:
Defendants.

ORDER
Entered: May 13, 1997

Now before the Court is the Motion of Defendant The Burlington and Santa Fe Railway Company to Amend Judgment (Docket #68) and Defendant Public Service Company of Oklahoma's Motion to Clarify April 7, 1997

Order and to Enter Judgment (Docket #69).

Both Defendants are concerned that the Order of April 7th, 1997 is not sufficiently clear that it was intended to dispose of all claims against all defendants, since the order, in fact, addressed only one of the motions for summary judgment. The Defendants therefore want the court to amend its Order and enter Judgment reflecting that it granted BN's motion for summary judgment. Plaintiff objects to this relief. The Defendants are correct in that the Order of April 7 did, and was intended to, dispose of all claims against all Defendants. The Court however, did not consider the Motion for Summary Judgment of Burlington Northern, because it became moot when the other motion was granted.

The Motions to Amend Judgment and to Clarify are granted in part and denied in part.

IT IS SO ORDERED THIS 9TH DAY OF MAY, 1997.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed: April 7, 1997]

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

B. Willis, C.P.A., Inc.,
Plaintiff,

v.

Public Service Company of Oklahoma,
an Oklahoma Corporation, and
Burlington Northern Railroad Company,
a foreign corporation:
Defendants.

ORDER
Entered: April 8, 1997

Now before the Court is the Motion to Dismiss (Docket #9 in 96-C-172-E) of the Defendant Public Service Company (PSO) in the above captioned matter.

Oklahoma District Court
Order - April 7, 1997

This case arises out of a condemnation action which is taking place in state court, in Rogers county. On October 28, 1992, PSO initiated a condemnation action seeking to take a perpetual easement and right of way for a single track industrial railroad spur tract which would cover property owned by Plaintiff in this action, B. Willis, C.P.A., Inc. (Willis). Commissioners were appointed, and a Report of the Commissioners was filed on December 28, 1992. Willis objected to the Report of the Commissioners, claiming that the taking by PSO was not necessary for a public use or purpose, and contesting the value placed on the property. Subsequently, a hearing was held in state court. Willis denies that the hearing afforded him a meaningful opportunity to litigate the right to take, and argues that the hearing was instead for the purpose of arguing a motion to compel he had filed attempting to secure certain documents from PSO. After that hearing, on March 8, 1994 the court overruled the pending discovery motions as well as Willis' exceptions to the Report. Willis perfected an appeal to the Court of Appeals, which held, on March 21, 1995, that the act of filing the petition raised a rebuttable presumption that the condemnation was necessary for a public use, but that the landowner was entitled to rebut that presumption. The Court of Appeals, on March 21, 1995, held that Willis was not given a proper opportunity to rebut the presumption, and remanded in order to give Willis an opportunity to do so. Both parties filed Petitions for Certiorari with the Oklahoma Supreme Court. Although the Petitions were granted, the Supreme Court has not yet ruled on the matter.

Shortly after the trial court overruled Willis' exceptions, PSO began construction on the railroad spur, and

construction was completed on March 1, 1995. During the construction of the spur, Willis sought extraordinary relief, and a stay of the district court' decision, from the Supreme Court, which was denied on June 21, 1994. After the spur was completed, and the Court of Appeals had ruled, Willis demanded that PSO cease use of the railroad line. PSO sought an injunction and temporary restraining order in district court. On May 2, 1995, after a hearing, an injunction was entered, restraining Willis from "directly or indirectly interfering in any manner with the construction, maintenance and operation of [PSO's] railroad spur . . . .

Willis responded by filing an action for trespass against Burlington Northern (BN), due to BN running a coal train over the 1069 feet of standard railroad track that lies on his property. Subsequently, Willis filed an action against PSO and BN for trespass' and violation of civil rights. The essence of Willis civil rights claim is that Willis was denied his civil rights when his property was taken prior to a hearing on the right to take.

The two cases were consolidated, and dispositive motions were filed by all parties. The parties agree that the facts are undisputed and that the key issue[1] is whether Willis' constitutional rights were infringed by the court's failure to afford him a hearing on the taking of his property prior to

---

[1] Claims of trespass, and that the rail spur required approval of the ICC were apparently dropped by Willis inasmuch as he failed to respond to the motion to dismiss regarding these claims. Nevertheless, the trespass claim, at least, depends on the issue to be resolved here.

PSO's taking possession of the property for purposes of building the spur. Put differently the question is whether in a condemnation action, due process requires the court to have a hearing on the right to take (if that is an issue) before the condemnor can take possession of the property. Plaintiff concedes that if his rights under the Fourteenth Amendment have not been violated, he has no standing in this court. Implicit in the issue before the court is the constitutionality of Okla.Stat.tit. 66, §53(a), or its application in this case, which provides, in pertinent part:

> And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

With the issue framed in this manner, the Court finds that Willis does not have a constitutional right to a hearing prior to PSO taking a possessory interest in his land. The reasoning of the court in Joiner v. City of Dallas, 380 F. Supp. 754, 764-65 (N.D. Tex. 1974), aff'd 419 U.S. 1042 (1974) is persuasive:

> That the power of eminent domain must be exercised in accordance with due process of law is an explicit requirement under the Fourteenth Amendment. The perimeters of the Due Process requirement in eminent domain

> proceedings have been sharply defined through a series of Supreme Court decisions, however, and the customary "due process" attack has limited chance of success. For example, the Court has repeatedly characterized the condemnor's decision on the necessity for a taking and the quantity to be appropriated as legislative, and has, therefor, denied to landowners the right to participate in that decision-making process or to litigate of federal constitutional grounds the decision to condemn private property.
>
> * * * * *
>
> The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.

Having noted this, the Joiner Court went on to reject Joiner's objection on constitutional grounds to prejudgment possession by the city. Joiner, at p. 771. The court stated:

> Any owner who believes that the condemnor is without authority to initiate condemnation proceedings or that there is no public purpose for the condemnation has two avenues of judicial review. First, by including these issues in the written objections filed in response to the Report of the Special Commissioners in condemnation, the property owner may litigate these matters in the county Court at Law with the right of appellate review of any final

> judgment. As an alternative, however, property owners may commence a simultaneous collateral injunctive action in district court.
>
> * * * * *
>
> Although plaintiffs contend in is "unconstitutional" to place the burden on property owners to request judicial review of the propriety of condemnation with federal case law.

Joiner, at p. 771-72.

Similarly, in Government of the Virgin Islands v. 19.623 Acres of Land, 536 F.2d 566, 571 (rd Cir. 1976), the court, relying on Joiner held that "the due process clause does not require that a landowner whose property is to be condemned be given a hearing in advance to determine whether the taking is necessary." The court in Virgin Islands specifically noted that the Supreme Court had rejected the notion that due process required a hearing on necessity of taking in Bragg v. Weaver, 251 U.S. 57, 58-59, 40 S.CT. 62, 64 L.Ed. 135 (1919). Virgin Islands, 536 F.2d at p. 570.

While Willis attempts, unsuccessfully, to distinguish Joiner, he makes two additional arguments. First, Willis relies on garnishment and replevin cases, Sniadach v. Family Finance Corp. Of Bay View, 395 U.S. 337, 89 S.Ct. 1820 (1960) and Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), which hold that a property owner has

a constitutional right to a hearing before his property can be taken. Joiner, however, rejects the notion that the reasoning in Sniadach can appropriately be applied to an eminent domain case. Joiner, 380 F.2d at 774.

Second, Willis relies on Oklahoma cases, Wrightsman v. Southwestern Natural Gas Co., 46 p.2d 925 (Okla. 1935) and Town of Ames v. Wybrant, 220 P.2d 693 (Okla. 1950), holding that the landowner has a constitutional right to a hearing before deprivation. These cases, however are distinguishable on their facts, and are not persuasive in light of Bragg.

Having determined that this case should be dismissed in that no federal constitutional right is implicated, the court now turns to the issue of sanctions. PSO seeks sanctions against Willis and his counsel for the filing of this Complaint asserting that it was "filed for an improper purpose: i.e., to unnecessarily and improperly commence litigation in this Court with respect to matters already pending before the Supreme Court of Oklahoma, and the District Court for Rogers County, thereby multiplying the expense of final adjudication of the parties disputes." Although Willis' claims were ultimately dismissed, the Court does not conclude that Willis "unnecessarily and improperly commenced litigation in this Court." Willis sincerely believed that he was pursuing a legitimate federal constitutional right. While this Court did not adopt Willis' position, the Court does not find that it was so lacking in merit as to warrant sanctions.

Oklahoma District Court
Order - April 7, 1997

PSO's Motion to Dismiss (Docket #9) is granted. PSO's Motion for Sanctions (Docket # 31 in 96-C-59-E) is denied.

IT IS SO ORDERED THIS 7TH DAY OF APRIL, 1997.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed: July 9, 1999]

No. 97-5107

B. Willis, C.P.A., Inc.,
Plaintiff-Appellant,

v.

Public Service Company of Oklahoma, an Oklahoma Corporation; Burlington Northern and Santa Fe Railway Company, a foreign corporation,
Defendants-Appellee.

ORDER

Before TACHA and BALDOCK Circuit Judges and GREENE,[1] District Court Judge.

Appellant's petition for rehearing is denied.

[1] The Honorable J. Thomas Green Senior District Court Judge for the District of Utah, sitting by designation.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

APPENDIX M

1997 OK 78

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

For Official Publication

[Filed June 24, 1997]
No. 83,358

Public Service Company of Oklahoma, an Oklahoma corporation, *Appellee*,	)
v.	)
B. Willis, C.P.A., Inc. *Appellant.*	)

CERTIORARI TO THE COURT
OF CIVIL APPEALS, DIVISION 4
AN APPEAL FROM THE DISTRICT COURT
OF ROGERS COUNTY, OKLAHOMA,
HONORABLE JAMES D. GOODPASTER,
TRIAL JUDGE.

¶ 0 **Eminent domain proceeding was brought by public utility to condemn right-of-way easement across portion of landowner's property for railroad purpose. District Court granted Judgment to utility. Landowner appealed adverse rulings on his exceptions to commissioners' report and motion to compel discovery. The Court of Civil Appeals affirmed In part and reversed in part.**

CERTIORARI PREVIOUSLY GRANTED.
COURT OF CIVIL APPEALS OPINION VACATED.
DISTRICT COURT REVERSED AND CASE
REMANDED FOR FURTHER PROCEEDINGS.

Stratton Taylor
Daphne A. Burns
Carle, Higgins, Mosler & Taylor,
Claremore, Oklahoma,

Kevin Coutant
Doemer, Stuart, Saunders,
Daniel, Anderson & Blolchini,
Tulsa, Oklahoma, For Appellee,

William T. Dickson
Tulsa, Oklahoma, For Appellant.

SIMMS, J:

Oklahoma Supreme Court
Certiorari - June 24, 1997

¶1 Certiorari was granted in this eminent domain proceeding to consider a landowner's contention that his constitutional and statutory rights were violated as he was denied any meaningful opportunity for a hearing before Public Service Company was allowed to exercise its asserted right to condemn and take possession of his land. We agree. We vacate the decision of the Court of Civil Appeals, reverse the trial court and remand for further proceedings.

¶2 Public Service Company (PSO) commenced this condemnation proceeding to acquire an easement across property owned by Willis (or landowner), for the purpose of building a thirteen mile railroad spur to transport coal to its Oologah power plant. In its petition, PSO alleged that it is a public service corporation duly authorized under 66 O.S. 1991 §§ 51-60 and 27 O.S. 1991 § 7, to exercise the power of eminent domain, that its acquisition of Willis' property is necessary for a proper purpose and that its efforts to secure the right-of-way by private purchase had been unsuccessful.

¶3 Commissioners were appointed and filed their report pursuant to 66 O.S.1991, § 53. Willis filed exceptions lo the commissioners' report under 66 O.S.1991; § 55, and alleged that the proposed taking of his properly was not for a public use or reasonably necessary therefor and demanded a Jury trial. Additionally, Willis served PSO with requests for discovery to gather evidence in support of his assertions in an effort to defeat the proposed taking. Among those discovery requests was a request for production of documents which encompassed any resolution of necessity adopted by the Board of Directors of PSO declaring the necessity for acquiring Willis' land for a public use, and a request for all information

regarding economic studies, contracts, analyses, and negotiations regarding the project. PSO refused to produce most of the documents including those specified, and Willis subsequently filed a motion to compel discovery.

¶4 At a pretrial hearing, the trial court announced that it would grant PSO's request to hear all pending motions and objections including both the landowner's motion to compel discovery and his exceptions to the commissioner's report. Willis objected that the matter was premature for the trial court's determination at that time. He argued that his reason for filing the motion to compel was to obtain relevant evidence to present at a proper trial on his exceptions to the report so that he could support his defense that the proposed taking was neither for public use nor necessary therefor. He argued that PSO had failed to carry its initial burden of proof as to its right to condemn his properly because it had not presented any evidence in support of the allegations of its petition. Willis submitted that in the absence of introducing a resolution by its Board of Directors declaring the necessity of taking his property for a public use, the utility did not present a prima facie case and was not entitled to prevail on its petition.

¶5 PSO contended that discovery for the landowner was irrelevant. It argued that because it had a legislative grant to condemn property pursuant to 27 O.S. 1991 § 7, Willis had no right to contest its taking of his land. The trial court held in favor of PSO and overruled both Willis' motion to compel discovery and his exceptions to the commissioners' report. The court ruled that PSO was not required to file a resolution of necessity with its petition and held further that

a simple allegation of necessity in the petition was sufficient to sustain PSO's case. For this determination, the court relied on its Interpretation of the holding in *McCrady v. Western Farmers Electric Cooperative,* 323 P.2d 356 (Ok1.1958). The trial court also found that in the event a resolution of necessity were required, the issue had become moot because subsequent to the pretrial hearing, PSO had submitted a supplemental brief and attached thereto a certified copy of a resolution of necessity asserted to have been adopted by its Board of Directors.

¶6 Willis appealed. He argued that by allowing PSO to seize his property for a proported but disputed necessary public use without granting him an adversary hearing on his challenge to the taking, the district court had ignored his constitutional and statutory rights as well as those protected by clear and well-developed Oklahoma case law. Willis contended that the trial court committed error by denying him the right to conduct relevant discovery and holding that a mere unsubstantiated allegation in a petition, unsupported by any evidence whatsoever, was sufficient to entitle PSO, acting under the sovereign power of eminent domain, to take his property.

¶7 The Court of Civil Appeals affirmed the trial court in part and reversed in part. That Court did agree with Willis that the trial judge abused his discretion in denying Willis his right to conduct relevant discovery and, to that extent, it reversed the trial court and remanded the matter for a hearing on the issue of whether the intended taking was for public use. The Court of Civil Appeals agreed with the trial court that PSO was not required to file a copy of a resolution of

necessity with its petition, and it also followed the trial court's interpretation of *McCrady v. Western Farmers Electric Cooperative,* supra, and held that a resolution declaring the necessity of the taking was unnecessary because the mere act of filing a petition which alleges the necessity of the taking, "raises a rebuttable presumption that the condemnation is necessary for public good." The Appeals Court held that at the hearing before the trial court on remand, Willis would accordingly bear the burden of proof to rebut a presumption in favor of PSO that the taking is necessary for a public purpose.

¶8 On certiorari, Willis points out that the combined result of the actions of the trial court and the Court of Civil Appeals has been to deny him all opportunity to present any defense to PSO's action to take his property over his protests. PSO has put on no proof whatsoever in support of its petition and none will be required at the hearing on remand before the trial court, as the Court of Civil Appeals has placed the burden of proof on him rather than the condemning authority where it should be, all in violation of Okla. Const. 2 §§ 23, 24 and 66 O.S. 1991 §§ 53, et seq.

¶9 PSO also sought certiorari, contending that the portions of the Court of Civil Appeals' decision allowing Willis' discovery requests and holding that the adversarial heading before the trial court had not been adequate in all respects were erroneous. Certiorari was previously granted to both parties, however, we do not find PSO's arguments persuasive and deny the utility all requested relief.

¶10 Landowner Willis is correct that both the trial court and the Court of Civil Appeals erred in holding that by merely filing a petition for condemnation, PSO established a prima facie case and is thereby entitled to a rebuttable presumption of the necessity of acquiring Willis' properly for public use. The trial court and the Court of Civil Appeals misunderstood the holding of *McCrady v. Western Farmers Electric Cooperative*, supra, for that decision does not support the rulings in this case.

¶11 In *McCrady,* one of the specific propositions of error raised by defendant landowners was that plaintiff's petitions were insufficient to invoke the court's jurisdiction because they did not allege that a resolution of necessity for condemnation had been adopted by the appropriate body. In answer to that proposition, the Court found that the petitions before it were sufficient to initiate the actions without such allegations. Because the applicable statutes governing the exercise of the power of eminent domain do not explicitly set forth any particular requirements for a pleading invoking the court's jurisdiction, the Court found certain requirements were implicit. Namely, that the petition disclose that the party seeking condemnation is authorized to exercise such power and that he has been unable to make a voluntary purchase of the property. The specific property sought to be condemned and the owner of that property should be alleged. Further, the Court held, it should appear that the specific property sought to be taken is necessary for the purpose for which the power of condemnation may be exercised. *McCrady* at 359.

¶12 The Court In *McCrady* found that the petitions at issue met those general requirements and were therefore legally sufficient. It was in this context of determining the legal sufficiency of the petitions that the Court ruled that a 'simple allegation' of necessity should be sufficient and that a specific allegation that a resolution of necessity for condemnation had been adopted by the appropriate body was not required. The Court did note there that where a resolution of necessity for condemnation has been adopted by the appropriate body, that determination is legislative in character and the factors overcoming that determination are for the defendant to assert.

¶13 Willis points out that the holding in *McCrady* is irrelevant to the issues in this case because it was not the sufficiency of PSO's petition which he challenged, but rather the lack of evidence presented in support of that petition at the hearing on his exceptions to the Commissioner's report concerning the necessity and purpose of the taking. We agree.

¶14 The mere filing of a petition does not establish a prima facie case. It is well-settled that the condemnor has the initial burden of proof on the issues in a condemnation proceeding and meets that burden to the extent of making a prima facie case of necessity by introduction into evidence of a resolution of necessity from the condemning authority, whereupon the burden of proof shifts to condemnee to show that the taking is not necessary. Rueb v. Oklahoma City, 435 P.2d 139 (Okl.1967); Bush v. Oklahoma City, 154 P.2d 960 (Okl. 1944); Lansden v. Bear, Falls and Coon Creek W&S Con. District #4, 370 P.2d 754 (Ok1.1962); Oklahoma Gas and Electric Company v. Chez, 527 P.2d 165 (Ok1.1974).

¶15 PSO never attempted to have its resolution admitted into evidence by the trial court. It simply attached the resolution to a supplemental brief. Willis, therefore, had no opportunity to challenge its authenticity under 12 O.S. 1991 §§3002, 3003, or present any other objections to the trial court regarding the purposed resolution. Nonetheless, in ruling in favor of PSO, both the trial court and the Court of Civil Appeals, have considered the resolution supportive of PSO's petition, assuming its authenticity and admissibility without comment. Willis was unable to challenge the resolution's introduction into evidence and consideration by the trial court and instead, has been forced to raise those various objections for the first time to the appellate court.

¶16 Condemnation is a proceeding strictly controlled by the constitution and statutes and must be carded out in accordance with specific procedures prescribed by the legislature. Constitutional and statutory provisions relating to eminent domain must be strictly construed in favor of landowner and against the condemning party. *Carter v. Oklahoma City, 1993 OK 134,* 862 P.2d 77 (Ok1.1993). All presumptions indulged must be in favor of those whose property is sought to be taken against their will. *Watkins v. Board of Com'rs of Stephens County,* 70 Okl. 30, 174 P. 523 (Okl. 1918).

¶17 It is undisputed that private property may not be taken or damaged by the condemning agency unless the taking or damage is necessary for the accomplishment of a lawful public use. Okla. Const Art. 2, § 23, 24,. The law provides a landowner such as Willis with the right and opportunity to contest the condemnor's right to take his property. There is a

right to a heading on all aspects of the plaintiffs right to condemnation upon timely and proper exceptions to the report of commissioners which challenge the condemnor's right to take the intended particular property. Before an entity having eminent domain authority can appropriate private land to its use, all the steps legally requisite must have been taken. Art. 2 §§ 23,24 Okla. Const.; 66 O.S. 1991, §§ 53,57; *Allen v. Transok Pipe Line Company,* 552 P.2d 374 (Ok1.1976).

¶18 Willis has challenged both the character of the use of the proposed taking as a public use and also its necessity to carry out this proposed public use, thereby raising questions of fact which must be adjudicated by the court. The necessity of taking private property for public purposes in eminent domain proceedings must be determined by conditions existing at the time of the taking. "Necessity" does not, mean an absolute but only a reasonable necessity, and the power of condemnation may be properly exercised in the absence of fraud, bad faith or an abuse of discretion. Whether it is necessary to take particular property for the economic and efficient accomplishment of a lawful public purpose is a question of fact to be determined from the attendant facts and circumstances developed by the evidence. The findings of the trial court on the issue of necessity of the taking will not be disturbed on appeal where there is evidence to support such findings. *City of Tulsa v. Williams,* supra; *McCrady v. Western Farmers Electric Cooperative,* supra; *Luccock v. City of Norman,* supra.

¶19 Under our constitutional provisions and cases interpreting them, the issue of whether a proposed taking is for a "public use" is a judicial question. McCrady v. Western

Farmers Electric Cooperative, supra; Arthur v. Board of Com'rs of Choctaw County, 43 Okl. 174, 141 P.1 (Okl.1914), City of Tulsa v. Williams, 100 Okl.116, 227 P. 876 (Okl.1924); *Sublett v. City of Tulsa,* 405 P.2d 185 (Okl.1965); *Delfield v. City of Tulsa,* 191 Okl. 541,131 P.2d 754 (1942).

¶20 The necessity, expediency and propriety of exercising the power of eminent domain are questions of general public policy and are governed by statute. Arthur v. Board of Com'rs., supra; *Luccock v. City of Norman,* supra. A valid declaration of necessity by the appropriate body will be viewed as conclusive by the courts in the absence of a showing of actual fraud, bad faith, or an abuse of discretion by the condemning authority. *Rueb v. Oklahoma City*, supra; *Luccock v. City of Norman*, supra.

¶21 Willis is correct. He was wrongfully denied an opportunity to challenge PSO's asserted but unproven right to take his property as well as the right to conduct discovery. The Court of Civil Appeals decision is vacated and the decision of the trial court is reversed. The cause is remanded for further proceedings not inconsistent with this opinion.

KAUGER, C.J., SUMMERS, V.C.J., and HODGES, SIMMS, OPALA, WILSON, and WATT, JJ., CONCUR. LAVENDER, and HARGRAVE, JJ., CONCUR IN PART, DISSENT IN PART.

APPENDIX N

NOT FOR PUBLICATION
IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION I

[Filed February 8, 1999]

No. 90,569

Public Service Company of Oklahoma, an Oklahoma corporation, *Plaintiff/Appellee*,	)
v.	)
B. Willis, C.P.A., Inc. *Defendant/Appellant.*	)

APPEAL FROM THE DISTRICT
COURT OF ROGERS COUNTY, OKLAHOMA
HONORABLE JAMES GOODPASTER,
DISTRICT JUDGE

AFFIRMED

William T. Dickson, Tulsa, Oklahoma — For Defendant/Appellant

Court of Civil Appeals for the State of Oklahoma
Opinion - February 8, 1999

Stratton Taylor,
Claremore, Oklahoma
Richard P. Hix,
Jon E. Brightmire,
Tulsa, Oklahoma, For Plaintiff/Appellee.

OPINION

Carl B. Jones, Chief Judge:

Appellee Public Service Company of Oklahoma [PSO] commenced this condemnation action in 1992 to acquire part of a tract of land owned by Appellant accountancy corporation [Owner] for construction of a rail spur to move coal to one of PSO's power plants in Oologah. Appellant questioned whether the taking was truly for a public use, and filed exceptions to the report of the appointed commissioners., The trial court summarily denied the exceptions. Owner appealed.

In March 1995, construction of the rail spur was completed, and PSO's contract rail carrier began operating on the line. In late March, another division of this Court issued an opinion holding that Owner should have been allowed to conduct discovery and to have an evidentiary hearing on the issue whether the rail spur was devoted to a public use. Owner's attorney then wrote to both PSO and the railroad demanding they cease operations on the spur and stating that Owner planned to rebuild the fences and "restore the property to its original use." In response, PSO filed a "Petition for Permanent Injunction, Temporary Injunction and Temporary Restraining Order Against [Owner]" in April, 1995, under the same case number as its eminent domain action. The new

petition alleged, *inter alia*, that "since the time of the [Court of Appeals] ruling, [Owner] corporately and by and through its counsel has notified [PSO] to cease all use of the railroad spur. . . " The trial court issued the requested temporary injunction. Owner did not appeal.

In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this court's 1995 opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for hearing before PSO could condemn and occupy the property, and that both the trial court and this court were wrong to say that the allegation of necessity in PSO's petition was sufficient to shift the burden of persuasion to Owner on the matter of necessity for public use.[1] In September, 1997, Owner filed a motion to vacate the temporary injunction combined with a motion to dismiss the petition for injunctive relief and damages PSO had filed in 1995, and again wrote to PSO and the railroad threatening to rebuild the fence lines around the property and to post "no trespassing signs." The trial court denied both of Owner's motions, and granted it 45 days to conduct discovery in aid of the objections to the commissioners' report. The injunction previously issued was left in place pending the outcome of a hearing on Owner's objections.[2] From that order, Owner has

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[1] ***Public Serv. Co. V. Willis,*** 1997 OK 78, 941 P.2d 995. PSO had presented no evidence to establish necessity except to attach a copy of its board's resolution of necessity to a brief.

[2] The trial court also denied Owner's application for injunction barring further operations on the rail line until the questions of public use and necessity were resolved.

brought the present appeal.

Owner's motion to vacate and to dismiss was filed over two years after entry of the injunction. Unless the order was void, Owner was limited to arguing that the order was entered because of "mistake, neglect or omission of the clerk," "irregularity in obtaining [the] order," or death of one the parties before judgment. 12 O.S.1991 §§1031 (Third), (Sixth); 12 O.S. Supp. 1993 § 1038. A void judgment, decree, or order may be vacated at any time on the motion of a party. 12 O.S. Supp. 1993 § 1038; see ***Stork v. Stork***, 1995 OK 61, ¶ 12, 898 P.2d 732, 738.

The trial court's decision whether or not to dissolve an injunction has been described as "to a certain extent, within the discretion of the court." ***Bourland v. Langford***, 36 Okla. 278, 128 P.240, 240 (1912); *see* ***Cloer v. Gillespie***, 1963 OK 195, ¶ 12, 386 P.2d 1015, 1017. We infer from that statement that the propriety of the trial court's decision is partly a matter of law and partly a matter of fact. Absent a palpable abuse of discretion or clear showing of error, we must affirm the trial court's ruling to grant or undo injunctive relief. ***Cloer***, 1963 OK 195 at ¶ 12, 386 P.2d at 1018.

Owner contends that PSO's 1995 petition seeking injunctive relief and damages should have been filed as a separate action. For that, he relies upon a distinction between "actions" and "special proceedings." In the oft-cited case ***Oklahoma City v. Wells***, 185 Okla. 369, 91 P.2d 1077, 123 A.L.R. 662 (1939), the court distinguished them: "Condemnation proceedings do not involve a tort. Strictly speaking they are not civil actions or suits. They are neither

actions at law nor suits in equity. They are not proceedings according to the course at common law, but are special proceedings," *Id.*, 91 P.2d at 1081. As a corollary, the courts have said that questions unrelated to public use and necessity of the taking or the value of the condemned property are beyond the jurisdictional power of the trial court in a condemnation case. *See* ***Burke v. Oklahoma City***, 1960 OK 29, ¶ 24, 350 P.2d 264, 269-70. In ***Burke***, the court said:

> "Our statutes prescribe the procedure for taking property by eminent domain, but do not provide that matters not germane to the issues involved may be litigated in the same action. The proceedings by the City are to condemn two tracts of land owned by the defendants . . . [D]efendants are not entitled to litigate in this action alleged damages for [*sic*] property which was the subject matter of a previous condemnation proceeding which is not either directly or indirectly involved in the instant case and which the defendants have no interest in. If defendants are entitled to seek damages by virtue of the previous proceedings, their claim can only be litigated in a separate action."

Cf., ***Bowling v. State ex rel. Bd. Of County Comm'rs,*** 1967 OK 121, ¶ 25, 428 P.2d 331, 337 (quoting ***Burke***).

The distinction discussed in ***Wells*** and numerous other cases was embodied in statutory law until 1984. Judicial remedies were divided into "actions" and "special

proceedings." An "action" was defined as "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense," while "special proceeding" was used to describe all other remedies. 123 O.S.1971 §§ 3-5 (*repealed*). In 1984, those sections were repealed by enactment of the Oklahoma Pleading Code, 12 O.S.Supp.1984 §§ 2001 *et seq.*[3] Repeal did not, however, discard the distinction at law between actions and special proceedings.[4] Condemnation is still referred to as a special proceeding strictly controlled by the constitution and governing statutes. ***Carter v. City of Oklahoma City***, 1993 OK 134, ¶ 12, 862 P.2d 77, 80.

There are three necessary elements of jurisdiction: jurisdiction of the subject matter; jurisdiction over the person; and jurisdictional power to render the particular judgment or decision in question. ***Reed v. Scott***, 1991 OK 113, ¶ 4, 820 O.2d 445, 447. Absence of any one of these elements, if

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[3] *See* Okla.Sess.Laws 1984, ch. 164, § 32.

[4] Examples of other special proceedings are probate, ***Ray v. American Nat. Bank & Trust Co.***, 1997 OK CIV APP 66, 948 P.2d 1235, *cert. denied*; judicial review of administrative orders, ***Pruitt v. State ex rel. Okla. Empl. Sec. Comm'n***, 1996 OK CIV APP 33, 918 P.2d 80; an ouster petition following grand jury accusation, ***McCormack v. Town of Granite***, 1995 OK 105, 913 P.2d 278; insurance company receivership, ***State ex rel. Hunt v. Green***, 1973 OK 29, 508 P.2d 639; and proceedings to declare children delinquent, deprived, or neglected, ***Stratton v. Steele***, 1974 OK 10, 519 P.2d 468.

apparent on the face of the judgment roll, renders the trial court's decision void, and therefore subject to vacation at any time. 12 O.S.Supp. 1993 § 1038; ***Stork v. Stork***, 1995 OK 61, ¶ 12 and n.17, 898 P.2d 732, 738; ***Graff v. Kelly***, 1991 OK 71, ¶ 7, 814 P.2d 489, 492.

Owner invokes the special nature of condemnation proceedings to argue that the trial court lacked jurisdictional power to render injunctive relief in the condemnation case. Because the pleadings allowed in a condemnation action are limited to the petition, demand for jury trial, and objection to the commissioners; report, *see, e.g.*, ***Western Farmers Elec. Coop. V. Willard*** 1986 OK CIV APP 5, ¶ 15, 726 P.2d 361, 364, *cert. denied*, Owner contends that a petition seeking injunctive relief in the same case was improper. On occasion, courts have stated that it is discretionary whether to permit additional pleadings in a condemnation case. *See* ***Incorporated Town of Pittsburg v. Cochrane***, 200 Okla. 497, 197 P.2d 287, 292 (1948); ***Rummage v. State ex rel. Dept. Of Transp.***, 1993 OK CIV APP 39, ¶ 18, 849 P.2d 1109, 1112. Clearly, though, the additional pleadings cannot raise the core issues inherent in a condemnation case; nor can they require the trial court to decide extraneous issues. *See* ***Board of Comm'rs of Creek County v. Casteel***, 1974 OK 31, ¶ 16, 522 P.2d 608, 610-11 (disapproving procedure of accepting answers to petition or to report objections; an answer "will not, in and of itself, raise any issue that can be determined in the proceeding . . .[and] is insufficient to bring to issue the question of amount of damages or the necessity of the taking.").

In a related argument, Owner contends that, because PSO's second petition was filed during the pendency of Owner's first appeal, the trial court lacked jurisdiction to render the order, and the order consequently is void. For that, he quotes from ***Dooley v. Foreman***, 94 Okla. 163, 221 P.47 (1923), which in turn cited ***Egbert v. St. Louis & S.F.R. Co.***, 50 Okla. 623, 151 P. 228 (1915). The court in ***Egbert*** stated the rule:

> It is a general proposition of law that no two courts have jurisdiction of the same cause of action at the same time, and, when a court has once had jurisdiction and lost it by appeal to another court, its authority to deal with the cause is suspended until jurisdiction becomes re-established. . . . And if the trial court makes an order in the cause pending appeal which materially affects the rights of the parties it is null and void.

Id., 151 P. At 229 [citations omitted]. However, the rule is qualified: "[A]n appeal which is taken removes from the jurisdiction of the lower court only the matter involved in the judgment or order from which the appeal is taken. Other independent matters and collateral proceedings are not covered by the appeal, and the lower court retains its jurisdiction over them." ***Herbert v. Wagg***, 27 Okla. 674, 117 P. 209, 211 (1911).

PSO contends that at the time of its second petition, it had a legal right to be on the property, following its tender into court of the amount of damages reported by the

commissioners, and that the trial court's order granting injunctive relief against Owner was a proper act related to enforcement of PSO's and/or its agent railroad to enter upon the property, construct and operate the spur line. PSO cites the case of ***Young v. Seaway Pipeline, Inc.,*** 1977 OK 248, 576 P.2d 1144. In that case, while the trial court was considering the landowner's exceptions to the commissioner's report, the armed landowner threw the condemnor's workman and its counsel off the property. The trial court, at the condemnor's request, issued a temporary restraining order. The appellate court said, "Under the circumstances presented we cannot say that the trial court's decision to grant the temporary restraining order during the interim while the application for injunctive relief was being considered was anything but amply justified." *Id.*, 1977 OK 248 at ¶ 15, 576 P.2d at 1148.

Young involved no demonstrable jurisdictional challenge to the proper scope of orders which may be entered in the course of a condemnation case, and plainly did not involve any matter of jurisdictional power during the pendency of an appeal. Even so, when it is read in the context of ***Wagg,***[5] ***Young*** suggests that granting injunctive relief in aid of a party properly upon the condemned premises, to bar interference with its operations there, is not

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[5] PSO contends that ***Wagg*** was the source for Sup.Ct.R. 1.37(a)(7), 12 O.S.Supp.1997, ch. 15, App., which states that after filing of a petition in error the trial court retains jurisdiction to "take action with respect to any issue collateral to a pending appeal." We merely note the similarity of the principle stated in ***Wagg*** and the appellate rule.

totally unrelated to the issues before the court in a condemnation case.

We hold that the trial court's order for relief to prevent Owner from rebuilding his fence lines across the condemned property and to forestall interference by Owner with operation of the rail spur was a proper exercise of the trial court's jurisdiction., The court did not, as Owner attempts to characterize it, purport "to adjudicate PSO's right to appropriate [Owner's] property." After issuance of mandate in the prior appeal, the trial court was required to give Owner an meaningful, evidentiary hearing on the issues of necessity and public use, applying the appropriate burden-shifting rules. It was not required to undo *all* that had transpired before then. We therefore reject Owner's contention that the trial court lacked jurisdictional power to enter the order granting PSO's request for injunctive relief.

Owner's other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. "Settled law of the case" is the doctrine of appellate practice barring relitigation of issues which were finally settled by a previous appellate opinion or which were not timely raised during prior appellate proceedings. ***Barnett v. Barnett***, 1996 OK 60, ¶ 13 n. 13, 917 P.2d 473, 477; ***Jackson v. Jones,*** 1995 OK 131, ¶ 12, n. 37, 907 P.2d 1067, 1074. The first appeal resolved only Owner's right to an evidentiary hearing, and the question whether PSO established a prima facie case of necessity by alleging necessity in its original petition. Neither of those

issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not even have been timely raised during the pendency of the first appeal, because it was not at issue then the first appeal was commenced.

For the reasons expressed in this opinion, we hold that the trial court did not exceed its jurisdiction by entering the order for injunction, and did not err by denying Owner's motion to vacate. The order is affirmed.

AFFIRMED.

HANSEN, P.J. and ADAMS, J., concur.

Supreme Court, U.S.
FILED
OCT 12 1999
OFFICE OF THE CLERK

No. 99-256

IN THE

Supreme Court of the United States

B. WILLIS, CPA, INC.,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA and BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Public Service Company of Oklahoma ("PSO") is a wholly-owned subsidiary of Central and Southwest Corporation and no publicly held company owns 10% or more of its stock. Respondent Burlington Northern and Santa Fe Railway Company ("BNSF Rwy") is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Background Facts

Respondent Public Service Company of Oklahoma ("PSO") is an Oklahoma public utility which provides electricity to its customers. By virtue of Okla. Stat. tit. 27, § 7 and Okla. Stat. tit. 66, §§ 51-60, PSO is authorized to acquire real property by condemnation.

PSO found it necessary to acquire an easement to build a railroad spur for transporting coal to one of its power plants. A portion of the easement needed by PSO crosses a portion of property owned by Petitioner B. Willis, C.P.A., Inc. ("Willis"). Having failed to acquire the necessary easement from Willis by private purchase, in October 1992 PSO commenced an eminent domain proceeding in state court.[1]

As the Court of Appeals noted, the procedure under Oklahoma law to take real property by condemnation may be outlined in five steps:

(1) The state district court, with notice to the landowner, selects a three person commission;

(2) the commissioners inspect the property, and file a report with the clerk of the court setting forth the value of the property to be taken;

(3) the condemnor may then pay the assessed sum into court, and take immediate possession of the property consistent with its proposed use;

(4) the landowner may file with the court written exceptions to the report objecting to the public use or necessity of the taking or the value assessed; and

(5) the state district court's judgment on the public use or necessity issues or the compensation issue may be appealed.

---

1. *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, Case No. C-92-507, Rogers County, Oklahoma District Court (hereinafter referred to as the "State Court Condemnation Action").

See Pet. App. A at 3a. As the Court of Appeals further noted, Oklahoma case law has also established that the landowner has the option to seek an injunction from the state district court to enjoin the condemnor from taking possession prior to the adjudication of the public use question. *Id.* at 7a.

In the State Court Condemnation Action, commissioners were appointed by the district court. The commissioners filed their report, setting the total compensation for the taking of Willis's property at $49,920. PSO promptly paid this amount to the court clerk, therefore giving it the right under Oklahoma law to take immediate possession of Willis's property consistent with its proposed use.

Willis filed written exceptions to the commissioners' report, contending that the taking was not necessary and was not for a public use, and that the amount of compensation set by the commissioners was inadequate. At no time between the date the commissioners filed their report and the date the state district court ruled on Willis's exceptions did Willis seek an injunction to enjoin PSO from taking possession of Willis's property after PSO paid the commissioners' award into court.

In March 1994 the state district court ruled in favor of PSO on Willis's claim that the taking was not necessary or for a public purpose. In doing so, the state district court held that the filing of the condemnation petition shifted the burden to Willis to present evidence to vitiate the taking, and rejected Willis's argument that PSO was required to introduce into evidence a resolution of necessity. Willis appealed this ruling.[2] Willis's appeal was limited to whether he was given a proper hearing and whether he was entitled to certain discovery. [3]

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2. Oklahoma Supreme Court Appeal No. 83,358.

3. Willis falsely asserts that in this appeal the Oklahoma Supreme Court ultimately determined that PSO wrongly took possession of Willis's property. PSO's possession of Willis's property had not been accomplished at the time of the state district court's ruling in March 1994, and was not an issue and was not addressed in the court's March

(Cont'd)

During the pendency of the state court appeal, Willis sought interim equitable relief from the Oklahoma Supreme Court prohibiting PSO from constructing the rail spur over Willis's property. The Oklahoma Supreme Court denied Willis's request.

While the state court appeal was pending, in March 1995 PSO completed the railroad spur and began transporting coal over it. When Willis threatened to interfere with the use of the railroad by PSO (and Respondent Burlington Northern and Santa Fe Railway Company ("BN"),[4] PSO's contract rail carrier), in April 1995 PSO obtained an injunction from the state district court prohibiting Willis from interfering, directly or indirectly, with the use of the railroad spur (the "April 1995 Injunction"). In issuing the injunction, the state district court held that PSO had a right to possession and use of Willis's property under Okla. Stat. tit. 66, § 53(C). Although under Oklahoma law Willis had a right to immediately appeal the entry of the injunction, *see* Okla. Stat. tit. 12, § 993, Willis did not exercise this right.

(Cont'd)

1994 judgment. Nor was the possession issue raised by Willis in the appeal. In its published opinion, *see infra* n.5, the Oklahoma Supreme Court did not address whether Okla. Stat. tit. 66, § 53(C) was lawful. The constitutional and statutory violation found by the Oklahoma Supreme Court concerned Willis's failure to have a meaningful opportunity to be heard as a result of the district court's ruling on the discovery and burden of proof issues, the two issues appealed.

In several state court proceedings following the Oklahoma Supreme Court's opinion, including at least three in the Oklahoma Supreme Court itself, Willis has made the same false assertion concerning the scope of the opinion. No court has agreed with Willis's fanciful interpretation of the opinion.

4. On December 31, 1996, The Atchison, Topeka & Santa Fe Railway Company was merged into Burlington Northern and Burlington Northern's name was changed to The Burlington Northern and Santa Fe Railway Company. References herein to "BN" refer to Burlington Northern Railroad Company before December 31, 1996 and to The Burlington Northern and Santa Fe Railway Company on and after December 31, 1996.

In Willis's state court appeal, the Oklahoma Court of Civil Appeals reversed in part and affirmed in part the state district court's ruling. Relying upon *McCrady v. Western Farmers Electric Cooperative*, 323 P.2d 356 (Okla. 1958), the Court of Civil Appeals agreed with the district court and PSO that PSO was not required to file a copy of the resolution of necessity with its petition, and held that the simple act of filing a petition which alleges the taking is necessary and for a public purpose raises a rebuttable presumption that the condemnation is necessary, shifting the burden to the landowner to rebut the presumption. However, the Court of Civil Appeals held Willis was entitled to certain discovery prior to the hearing, and therefore reversed the judgment for a new hearing following such discovery.

Subsequently, on certiorari review, the Oklahoma Supreme Court vacated the Court of Civil Appeals' opinion and reversed the state district court's judgment in its entirety. In a published opinion, the Oklahoma Supreme Court held the Court of Civil Appeals and the state district court erred in their burden of proof analysis, and further erred in denying Willis certain discovery materials.[5] The Oklahoma Supreme Court remanded the case for a new hearing on the public use and necessity issues consistent with its opinion.

Before a new hearing could be held in the state district court, Willis filed a motion to vacate the April 1995 Injunction and to dismiss the condemnation proceeding based, in part, on the contention it makes here that the Oklahoma Supreme Court's opinion determined PSO was wrongly in possession of Willis's property. The state district court denied Willis's motion. Willis appealed the denial of its motion.[6] The Oklahoma Court of Civil Appeals affirmed the district court's judgment. Pet. App. N at 52a. After holding that under Oklahoma law "granting injunctive relief in aid of *a party properly upon the condemned premises, to bar interference with its operations there*, is not totally unrelated to

5. *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997) (Pet. App. M, at 41a).

6. Oklahoma Supreme Court appeal No. 90,569.

the issues before the court in a condemnation case," *id.* at 60a-61a (emphasis added), the court rejected Willis's interpretation of the Oklahoma Supreme Court's opinion in the first appeal:

> [Willis's] other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. . . . *The first appeal resolved only [Willis's] right to an evidentiary hearing, and the question whether PSO established a prima facia case of necessity by alleging necessity in its original petition.* Neither of those issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not even have been timely raised during the pendency of the first appeal, because it was not at issue when the first appeal was commenced.

Id. at 61a-62a (emphasis added). The Oklahoma Supreme Court denied Willis's petition for writ of certiorari to review the Court of Civil Appeals' decision. Mandate has issued, and the case is once again before the state district court for an evidentiary hearing on the right to take issue.

B. Course of Proceedings and Disposition Below.

Prior to the Oklahoma Supreme Court's decision in *PSO v. Willis*, Willis filed these two actions in federal district court. Willis first filed an action against BN for trespassing. Willis then filed a second action against both PSO and BN. In this second action Willis sought to recover against PSO under 42 U.S.C. § 1983. Willis alleged that PSO, by virtue of having taken possession of Willis's property after paying the amount assessed by the commissioners into court, and prior to adjudication of Willis's objection to PSO's right to take its property, violated Willis's constitutional right to equal protection of the law, due process of the law, and access to courts. Willis

further alleged PSO violated Willis's freedom of speech rights when PSO obtained the April 1995 Injunction. In the second action, Willis continued to allege BN was a trespasser.[7]

The two federal actions were consolidated, and dispositive motions were filed by all parties. In its brief in support of its motion to dismiss (which was converted to a motion for summary judgment), PSO set forth a statement of undisputed facts which supported each of its grounds for dismissal. Included among the statements of fact set forth by PSO was the following:

> 17. PSO has done nothing to prevent Willis from asserting his legal and factual positions in the State Court Condemnation Action.

Aplee. Supp. App. at 10.

Willis admitted all the facts set forth by the record of PSO, including statement 17 quoted above. *Id.* at 95. Further, in its statements of fact Willis admitted that "PSO took possession of the Willis property under 66 O.S. § 53(C) on the grounds that it had paid the amount of the commissioners' report to the court clerk." *Id.* at 96.

As the Court of Appeals noted, the District Court identified the crucial issue in the case to be whether Willis had a constitutional right to a final judicial determination of PSO's right to take Willis's property prior to PSO taking possession. The District Court held that no federal right was violated under the undisputed facts of the case, and therefore granted judgment to PSO and BN dismissing Willis's claims.

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7. The Petition misrepresents that Willis has properly sought relief against BN under 42 U.S.C. § 1983. *See, e.g.*, Pet. at 5. The § 1983 claim filed by Willis in the second action did not include BN. Rather, Willis sued BN in the second action solely for trespass. While Willis sought leave to file an amended complaint in the second action to assert violations of its civil rights by BN, leave was never granted by the District Court, and Willis did not appeal the District Court's failure to grant such leave.

Willis appealed the District Court's judgment to the Court of Appeals. In its Brief in Chief, Willis stated the "Issues Presented for Review" to be the following:

> I. Did the District Court err when it held that the failure to grant Willis a predeprivation hearing on the judicial issue of the public use of PSO's taking of Willis's property did not violate Willis's federally-protected right to equal protection of the law?
>
> II. Did the District Court err when it held that the failure to grant Willis a predeprivation hearing on the judicial issue of the public use of PSO's taking of Willis's property did not violate Willis's federally protected right to due process of law?
>
> III. Did the District Court err when it held that the failure to grant Willis a predeprivation hearing on the judicial issue of the public use of PSO's taking of Willis's property did not violate Willis's federally protected right of access to the courts?
>
> IV. Did the District Court err when it held that the injunction PSO subjected Willis to on April 3, 1995 did not violate Willis's right to freedom of speech?
>
> V. Did the Oklahoma Supreme Court decision establish the trespass claim against BN independent of any § 1983 claim?

Brief in Chief of Appellant at 3. Further, in its "Statement of Case" Willis stated:

> [t]he basis of this action is the acts of Appellees in taking possession of Appellant Willis's property under color of state law prior to a hearing and judicial determination of the public use of such taking in violation of Willis's constitutional and statutory

> rights as established by the decision of the Oklahoma Supreme Court.

Id. Thus, despite Willis's attempt to now expand the factual and legal bases for its claims in its Petition, Willis's appeal to the Court of Appeals involved only: (1) Willis's claim that its failure to receive a predeprivation hearing on PSO's right to take violated its federal constitutional rights to equal protection of the law, due process of law, and access to courts; (2) Willis's claim that the April 1995 Injunction entered in the State Court Condemnation Action violated Willis's freedom of speech rights; and (3) Willis's claim that BN was a trespasser.

The Court of Appeals, in an unpublished opinion, affirmed the District Court's dismissal. With respect to Willis's facial challenge of the constitutionality of the Oklahoma eminent domain procedure because such procedure permits a condemnor to take immediate possession upon payment of the amount assessed by the commissioners before final adjudication of a landowner's objection to the right to take, the Court of Appeals held that a predeprivation hearing is not constitutionally required in the eminent domain context. With respect to Willis's specific objections to its own eminent domain proceeding, the Court of Appeals held that Willis's constitutional claims were not ripe because there had not been a final adjudication of PSO's right to take in the state eminent domain proceeding. With respect to Willis's freedom of speech claim related to the April 1995 Injunction, the Court of Appeals held there was nothing facially speech sensitive about the injunction, and Willis failed to cite any authority to support such a claim. Finally, with respect to Willis's trespass claim against BN, the Court of Appeals noted that Willis itself recognized the claim depended in the first instance upon the legitimacy of the ongoing eminent domain proceedings. The Court of Appeals made it clear that its dismissal of Willis's numerous unripe claims based on lack of subject matter jurisdiction was without prejudice.

C. The Petition for a Writ of Certiorari

Willis requests this Court grant certiorari to review the opinion of the Court of Appeals, asserting six grounds. Willis contends: (1) the Court of Appeals determined a property owner is required to accept just compensation when property is condemned for a private use; (2) there is a procedural due process right to a predeprivation hearing on the public use issue prior to the condemnor taking possession of the condemned property; (3) property owners may maintain an action under 42 U.S.C. § 1983 for subversion of the judicial process; (4) the Court of Appeals erred in holding Willis's due process, equal protection, and access-to-court claims were not ripe; (5) Willis was not required to seek just compensation in state court prior to bringing an action under 42 U.S.C. § 1983; and (6) federal courts are required to follow state law.

Many of the issues of which Willis seeks certiorari review were neither presented as issues to the Court of Appeals nor represent the holding of the Court of Appeals. In any event, each of the issues raised by Willis suffer from the same infirmity: each fails to assert any basis under this Court's Rule 10 for the Court to exercise its sound judicial discretion to review the Court of Appeals' opinion. And, as demonstrated below, the Court of Appeals' opinion, which is unpublished and therefore not binding precedent, *see* 10th Cir. R. 36.3(A), neither "rejects the controlling decisions of the United States Supreme Court on a wholesale basis" nor "blatantly misstates Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court," as asserted by Willis.[8]

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8. At most, Willis complains of a misapplication of a properly stated rule of law which, as Rule 10 recognizes, rarely results in the granting of a petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DID *NOT* HOLD THAT A PROPERTY OWNER IS REQUIRED TO ACCEPT JUST COMPENSATION WHEN A CONDEMNOR SEIZES PROPERTY FOR A PRIVATE USE. RATHER, THE COURT OF APPEALS PROPERLY HELD THAT WILLIS'S CLAIMS BASED UPON THE ASSERTION THAT PSO'S CONDEMNATION WAS FOR A PRIVATE USE WERE NOT RIPE, BUT MUST AWAIT DETERMINATION OF THE PUBLIC USE ISSUE IN THE STATE COURT PROCEEDINGS.

As its first basis for seeking certiorari from this Court, Willis contends the Court of Appeals held Willis was restricted to maintaining a state action for just compensation. The Court of Appeals held no such thing. Rather, the Court of Appeals, relying in part upon *Williamson County Regional County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), found virtually all of Willis's claims were not ripe because the state court proceedings had not been concluded. Among the issues in the state court proceedings which have not been litigated is the public use issue. Thus, the Court of Appeals' decision that Willis's claims are not ripe was correct, and Willis's first ground for seeking certiorari has no merit.

In *Williamson* this Court held that a state administrative action of which a plaintiff complains must be final before it is reviewable by a federal court under 42 U.S.C. § 1983. The finality requirement enables the issues and factual components of the dispute to be sufficiently fleshed out to permit meaningful judicial review. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (a controversy is not ripe for judicial review "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148

(1967) (the "basic rationale" of the ripeness requirement is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" and to eliminate "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way"). As this Court noted in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* at 348.

The very nature of Willis's complaint in this case, given the posture of the state court proceedings, compels the conclusion that its claims are not ripe. In its Petition Willis repeatedly states PSO's use of the railroad spur is "non-public" as though there has been such a finding in the state court. *See, e.g.*, Pet. at 10. There has never been such a finding. In fact, the only finding in the state court action was that PSO's taking was public. The trial court so found in March 1994. That finding was subsequently reversed by the Oklahoma Supreme Court, which held the trial court utilized an improper burden of proof at the hearing. The Oklahoma Supreme Court remanded the case back to the trial court for a new hearing on the public use issue under the proper burden of proof.[9] As of this writing the case is awaiting such a hearing. Thus, as between these parties, there has been no final adjudication that PSO's use is non-public.[10]

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9. The case in which the Oklahoma Supreme Court reversed the trial court and remanded the case to the trial court is appended to the Petition at M. Willis misrepresents the extent of the Oklahoma Supreme Court's decision on page 9 of the Petition, as well as elsewhere in the Petition. Willis continues to assert that the Oklahoma Supreme Court found PSO's possession to be unlawful despite the fact that issue was not before the court, that issue was not addressed by the court, and in subsequent proceedings the state courts have rejected Willis's construction of the Oklahoma Supreme Court's opinion in such a way. *See, e.g.*, App. N to Petition at 61a-62a.

10. In a companion eminent domain case involving other landowners along the same railroad line being condemned by PSO in

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Once again, the Court of Appeals did not hold Willis is required to accept just compensation if PSO's condemnation is for a private use. The Court of Appeals simply held that for those claims asserted by Willis which derive from the eminent domain proceedings, including its ancillary constitutional claims, such claims are not ripe until there is a final determination in the eminent domain proceeding whether PSO's condemnation is for a public use. The ripeness rule encompasses ancillary constitutional claims because, as the Tenth Circuit previously held, "[a] contrary holding would render the Supreme Court's decision in *Williamson* nugatory, as it would enable a resourceful litigant to circumvent the ripeness requirements simply by alleging a more generalized due process or equal protection violation." *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

The first issue raised by Willis, therefore, presents no compelling basis for this Court to exercise its discretion to grant certiorari review.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT A PREDEPRIVATION HEARING ON THE PUBLIC USE ISSUE IS NOT CONSTITUTIONALLY REQUIRED IN EMINENT DOMAIN PROCEEDINGS.

The second issue Willis presents in its Petition is whether there is a procedural due process right to a hearing on public use prior to the condemnor taking possession of the condemned property. Willis cites no decisions of this Court to support its argument that a predeprivation hearing is required.

Under Oklahoma constitutional and statutory law, once a condemnor pays into court the amount assessed by the commissioners, the condemnor is entitled to possession of the

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this case, there was a final order entered establishing PSO's use of the railroad spur is necessary and for a public purpose. *See* Instruments in *Public Service Company of Oklahoma v. W.L. Morris, et al.*, Case No. C-92-503, Rogers County, Oklahoma District Court, Exhibit D to Appendix filed by PSO in response to injunction sought by Willis in the Court of Appeals in this case.

condemned property. Okla. Const. Art. 2, § 24;[11] Okla. Stat. tit. 66, § 53(C).[12] Willis admits PSO paid the amount the commissioners awarded into court prior to taking possession of Willis's property. However, Willis maintains PSO's possession prior to a hearing on the public use issue deprived Willis of its procedural due process rights.

Willis's position was rejected by this Court long ago. In *Bragg v. Weaver*, 251 U.S. 57 (1919), a landowner sought an injunction against the taking of earth from his land to be used in repairing an adjacent public road. This Court phrased the landowner's objection thusly:

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11. This section provides in pertinent part:

> Private property shall not be taken or damaged for public use without just compensation . . . Such compensation shall be ascertained by a board of commissioners. . . . *Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. . . .*

(Emphasis added.)

12. This section provides, in pertinent part:

> The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. . . . *And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.*

(Emphasis added.)

> The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.

Id. at 58. The Court rejected the landowner's contention, stating:

> Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, *and a hearing thereon is not essential to due process in the sense of the 14th Amendment.*

Id. (emphasis added). Further, with respect to the landowner's appellate rights, this Court stated:

> The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the 14th Amendment merely because it precedes the ascertainment of what compensation is just. . . . As before indicated, it is not questioned that such adequate provision for payment is made in this instance.

Id. at 62 (citations omitted).

This Court subsequently reaffirmed the *Bragg* principle that the Fourteenth Amendment does not require the hearing to which Willis claims it is entitled. In *Joiner v. City of Dallas*, 419 U.S. 1042 (1974), *reh'g denied*, 419 U.S. 1132 (1975), *aff'g*, 380 F. Supp. 754 (N.D. Tex. 1974) (per curiam) (3-judge court), this Court affirmed the district court's decision that the landowner has no due process right to a hearing on the question of the right to take prior to the condemning authority entering

upon and taking possession of the property.[13] Like Willis does here, one of the constitutional challenges raised by the landowners in *Joiner* was "that potential condemnors may acquire the right to possession through Article 3268 prior to an adjudication of the right of condemnation, the necessity for condemnation, or the amount of compensation to be paid." *Joiner*, 380 F. Supp at 771. The *Joiner* Court then explained the relevant aspects of Texas condemnation law, and the protection afforded landowners under Texas law, thusly:

> Initially, we note that both the Texas constitution and the Fourteenth Amendment require that condemnation be for a public purpose and that just compensation be paid to the property owner. Any owner who believes that the condemnor is without authority to initiate condemnation proceedings or that there is no public purpose for the condemnation has two avenues of judicial review. First, by including these issues in the written objections filed in response to the Report of the Special Commissioners in Condemnation, the property owner may litigate these matters in the County Court at Law with the right of appellate review of any final judgment. *Pursuit of this avenue of review does pose the risk that the condemnor will gain the right of possession through Article 3268.*

13. Even though the *Joiner* decision was a summary affirmance without an accompanying opinion, the affirmance was on the merits and has precedential effect. The plaintiffs in *Joiner*, having been denied an injunction by a properly constituted three judge court, had a right of appeal to this Court. 28 U.S.C. § 1253. Once the case was within the appellate jurisdiction of this Court, this Court was required to adjudicate the matter. *Hicks v. Miranda*, 422 U.S. 332 (1975). The Court "[was] not oblig[ed] to grant the case plenary consideration, and [it] did not; but [the Court was] required to deal with its merits." *Id.* at 344. As this Court stated several years earlier, "[v]otes to affirm summarily, . . . it hardly needs comment, are votes on the merits of a case . . . ." *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (separate opinion of Brennan, J.).

> As an alternative however, property owners may commence a simultaneous *collateral injunctive action* in district court. If the proposed appropriation is not for a public purpose or the condemnor does not have the power to condemn property, the condemnation proceedings are void, the County Court at Law is without jurisdiction, and the district court will enjoin the condemnation proceedings. . . . *We believe that the ability of the property owners to receive a judicial adjudication of the right to condemn private property through a collateral proceeding sufficiently protects their interest in the property sought to be condemned.*

Id. at 771-2 (emphasis added).

Oklahoma law is very similar to the Texas law reviewed by the *Joiner* Court. The Oklahoma Constitution requires that condemnation be for a public purpose and that just compensation be paid to the landowner. *See* Okla. Const. Art. 2, §§ 23, 24. And under Oklahoma law a landowner may challenge the public purpose for the condemnation in a fashion similar to that permitted by Texas law: by including these issues in written objections filed in response to the report of the commissioners, *see* Okla. Stat. tit. 66, § 53(C) and *Western Farmers Electric Cooperative v. Willard*, 726 P.2d 361, 363 (Okla. Ct. App. 1986), and by seeking injunctive relief. *See Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925, 933 (Okla. 1935) (trial judge could "in a proper case and upon proper application and showing in connection with preliminary steps in a condemnation proceeding, make an order temporarily restraining a condemnor from taking possession of the land pending final determination of the right to condemn by the court proper"); *Town of Ames v. Wybrant*, 220 P.2d 693, 696 (Okla. 1950) (same).

This Court's summary affirmance of the district court's judgment in *Joiner*, an affirmance which was on the merits and upheld the district court's conclusion that a condemnor may, consistent with the Fourteenth Amendment, acquire possession

of property prior to a hearing on the right to condemn or the necessity for condemnation, governs this case and establishes that Oklahoma's statutory scheme permitting a condemnor to take possession upon the condemnor's payment of the commissioners' award into court is likewise constitutional. *See also Government of Virgin Islands v. 19.623 acres of land*, 536 F.2d 566, 570 (3d Cir. 1976) ("[i]t has long been the rule that the due process clause does not require that a landowner whose property is to be condemned be given a hearing in advance to determine whether the taking is necessary") (*citing Bragg*, 251 U.S. at 58-59).

It is equally clear that the United States Supreme Court cases relied upon by Willis involving personal property — such as *Fuentes v. Shevin*, 407 U.S. 67 (1972) — have no application to the determination of the constitutionality of Oklahoma's eminent domain procedures. In *Joiner* the landowners contended that under Texas statutes the power granted to the condemning authority to enter upon and take possession of property prior to an adjudication of the right of condemnation violates the "modern" standards of due process developed through, *inter alia*, *Fuentes*. *Joiner*, 380 F. Supp. at 772. The *Joiner* Court specifically rejected the landowners' contention.

> Although it is unnecessary to our decision, we feel compelled to note that in our opinion plaintiffs have failed to establish that the amount of process constitutionally due in eminent domain procedures has changed since *Bragg*, *Sweet*, and their related cases. We do not believe that the due process standards evolving from *Sniadach*, *Lynch*, *Fuentes* and *Mitchell* are applicable to the condemnation of property under the doctrine of eminent domain. . . .
>
> * * *
>
> *For these reasons, we believe the power of eminent domain to be unique and distinct from any alleged right of possession arising from debtor —*

> *creditor relationships and decline to apply the due process standard created by Sniadach and its progeny to this sovereign power.*

Id. at 773-74 (emphasis added). Again, this Court's summary affirmance of *Joiner* constitutes an affirmance of that part of the *Joiner* decision rejecting the application of *Fuentes* and other debtor/creditor cases to eminent domain proceedings.

Because Willis admits PSO has followed the provisions of Okla. Stat. tit. 66, § 53(C) in taking possession of Willis's property and constructing the railroad track across it, it follows that PSO's possession, use, and defense of the railroad track, including defending the track from interference by Willis, does not "implicate" any of Willis's rights under the United States Constitution. Accordingly, the Court of Appeals correctly held that a predeprivation hearing is not constitutionally required in eminent domain proceedings.

III.

WILLIS'S THIRD CLAIM — THAT PROPERTY OWNERS MAY MAINTAIN ACTIONS IN FEDERAL COURT UNDER SECTION 1983 AGAINST PARTIES WHO SEIZE THEIR PROPERTY BY SUBVERTING THE JUDICIAL PROCESS — MISSTATES THE COURT OF APPEALS' OPINION AND SHOULD NOT BE CONSIDERED BY THE COURT.

For its third ground for certiorari review, Willis states "[p]roperty owners may maintain actions in federal court under 42 U.S.C. § 1983 against parties who seize their property by subverting the judicial process." Pet. at 14. Willis contends the Court of Appeals' opinion conflicts with *Dennis v. Sparks*, 449 U.S. 24 (1980).

First, the Court of Appeals did not hold that property owners may not maintain a § 1983 claim based upon subversion of the judicial process.

Second, Willis failed to provide any evidence of its scurrilous factual allegations. Willis admitted each factual statement set forth in the brief in support of PSO's motion to dismiss (which was converted to a motion for summary judgment). Included among the factual statements made by PSO which Willis admitted was the following:

> 17. PSO has done nothing to prevent Willis from asserting his legal and factual positions in the State Court Condemnation Action.

Aplee. Supp. App. at 10, 95. Given Willis's admission that PSO did not prevent Willis from asserting its rights in the state court action, and the complete absence of any evidence of such interference by PSO, the Court of Appeals had no basis to hold Willis stated a § 1983 action against PSO for subversion of the judicial process.

Third, Willis failed to allege any compelling reason for this Court to exercise its discretion to grant certiorari review. While certiorari may be granted when a Court of Appeals has decided an important question of federal law in a way that conflicts with a decision of this Court, the Court of Appeals' opinion in this case does not conflict with *Dennis v. Sparks*. Nowhere in its opinion did the Court of Appeals hold that Willis may not assert a § 1983 action. Rather, the Court of Appeals simply held that any constitutional claim Willis may have is not ripe until the state court eminent domain proceeding is concluded.

In its Petition, Willis continues to allege scurrilous factual allegations which have absolutely no support in the record. For instance, Willis alleges PSO "intentionally" and "corruptly" persuaded the state district court judge to rule against Willis. This allegation stems from the state district court's decision in March 1994 overruling Willis's objection to the condemnation based upon the lack of necessity or

public purpose, the decision which was ultimately reversed by the Oklahoma Supreme Court.[14]

There is no question that PSO argued that under Oklahoma law the allegation of necessity and public purpose in its condemnation petition was sufficient to shift the burden to present evidence to vitiate the taking to Willis. In doing so, PSO relied upon *McCrady v. Western Farmers Electric Cooperative*, 323 P.2d 356 (Okla. 1958). Both the state trial court and the Oklahoma Court of Civil Appeals agreed with PSO's position, also relying upon *McCrady*. The Oklahoma Supreme Court, however, disagreed, and in clarifying Oklahoma law held the initial burden is on the condemnor, that burden is not met by the simple allegation of necessity in the petition, and introduction of a resolution of necessity adopted by the appropriate body into evidence would meet the condemnor's burden. The Oklahoma Supreme Court remanded the case to the trial court for a new hearing on the taking issue consistent with its opinion.

There was no holding by the Court of Appeals that a landowner may not bring a § 1983 action for subversion of the judicial process. There is no factual support for the issue in any event. There is no evidentiary record here like there was in *Dennis v. Sparks*. Accordingly, certiorari review of the third issue presented by Willis should be denied.

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14. Willis's attempt to assert the corrupt subversion of the state court judge in 1994 is belied by the fact that Willis made no attempt to seek the disqualification of the judge from the ongoing eminent domain proceeding until more than three years later. Neither the presiding judge of the judicial district nor the Oklahoma Supreme Court, after holding hearings, required disqualification of the state court judge, despite Willis's application to both to have the district judge disqualified.

IV.

IN ITS FOURTH ARGUMENT, WILLIS SEEKS CERTIORARI REVIEW OF ITS CONTENTION THAT WHEN VIOLATIONS OF MULTIPLE CONSTITUTIONAL PROTECTIONS ARE ALLEGED A FEDERAL COURT MAY NOT BASE ITS DECISION ON WHAT IT DEFINES AS THE PREDOMINANT CLAIM. CERTIORARI REVIEW OF THIS ISSUE SHOULD BE DENIED BECAUSE WILLIS HAS FAILED TO IDENTIFY ANY COMPELLING REASON FOR REVIEW, AND THE COURT OF APPEALS' OPINION WAS CORRECT.

In its fourth argument, Willis asserts the Court of Appeals erred in holding Willis's due process, equal protection, and access-to-courts claims were also encompassed by the ripeness rule applied by the Court of Appeals, and were therefore premature. As sole support for this claim, Willis relies upon *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

All of Willis's constitutional claims arise out of the state court eminent domain proceeding. As detailed earlier in this brief, *supra* at 7, Willis tendered five issues for review to the Court of Appeals. Three of the five issues concerned whether PSO's possession of Willis's property prior to a hearing on the right to take violated specific constitutional rights of Willis. The operative facts for each of these claims are the same, and the underlying principle to be applied is the same. So while Willis may have asserted different theories of recovery, his cause of action is one and the same.

That the first three issues asserted by Willis alleged but a single cause of action is borne out by Willis's Statement of Case in its appeals court brief, in which Willis stated that "[t]he basis of this action is the acts of Appellees in taking possession of Appellant Willis's property under color of state law prior to a hearing and judicial determination of the public use of such taking in violation of Willis's constitutional and statutory rights

as established by the decision of the Oklahoma Supreme Court." Brief in Chief of Appellant at 2-3.[15]

The Court of Appeals addressed and resolved separately Willis's facial challenge to Oklahoma's eminent domain procedures. Having determined Oklahoma's eminent domain procedures are constitutional, the remainder of Willis's claims relating to the actual adjudication of the taking issue itself by the Oklahoma courts clearly are not ripe until there is a final decision by the Oklahoma courts on the right to take issue.

The Court of Appeals' decision in this case does not run counter to *James Daniel*. First, *James Daniel* was not an eminent domain case, and did not involve collateral state court proceedings the outcome of which would have a direct impact on the plaintiff's federal claims. Second, *James Daniel* contained no discussion of the ripeness rule applied by the Court of Appeals in this case. Third, the Court of Appeals did not hold that Willis cannot assert multiple constitutional wrongs, or may only assert its dominant constitutional claim. Rather, for purposes of applying the ripeness rule, the Court of Appeals found that all of the constitutional infirmities of which Willis complains relate to the state eminent domain proceedings, and therefore pursuit of such claims should await the ripening of the predominant claim.

Thus, the Court of Appeals' decision is not in conflict with this Court's holding in *James Daniel*. Willis has completely failed to identify any compelling basis for this Court to grant certiorari with respect to Willis's Fourth Argument.

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15. As previously observed, because Willis's objections under the most pertinent provision of the federal constitution is not ripe, its ancillary constitutional claims are likewise unripe. *Supra* at 12. Any contrary holding would permit one to circumvent *Williamson's* ripeness requirement with generalized due process and equal protection complaints, a result the Tenth Circuit has repeatedly rejected. *Bateman* at 709.

V.

IN ITS FIFTH ARGUMENT, WILLIS MAKES THE SWEEPING CLAIM THAT THE COURT OF APPEALS HELD THAT A PROPERTY OWNER IS REQUIRED TO SEEK JUST COMPENSATION IN STATE COURT BEFORE BRINGING A § 1983 ACTION IN FEDERAL COURT FOR VIOLATION OF SPECIFIC CONSTITUTIONAL PROTECTIONS. THE COURT OF APPEALS HELD NO SUCH THING. THE COURT OF APPEALS DETERMINED TWO OF WILLIS'S CLAIMS ON THE MERITS, AND HELD THE REMAINDER OF WILLIS'S CLAIMS ASSERTING PARTICULAR OBJECTIONS TO THE STATE PROCEEDING MUST AWAIT A FINAL DECISION IN THOSE PROCEEDINGS.

In its Fifth Argument, Willis asserts a property owner is not required to seek just compensation in state court before bringing a § 1983 action in federal court for violation of specific constitutional protections. This sweeping assertion by Willis makes no attempt to distinguish between the various issues Willis raised on appeal and the different dispositions of those issues by the Court of Appeals, thus misstating the Court of Appeals' holding.

The Court of Appeals determined on the merits Willis's generalized facial challenge to Oklahoma's eminent domain procedure, as well as Willis's freedom of speech claim. The Court of Appeals did not hold that these two claims must await the seeking of just compensation.

However, as the Court of Appeals recognized, Oklahoma law "affords [Willis] the right to challenge both the justification of PSO's taking and the adequacy of any resulting compensation." Pet. App. at 5a. Because both the taking issue and the just compensation issue have been raised by Willis in the state court proceedings, and those proceedings have not been concluded, the Court of Appeals properly determined that any objection Willis may have to the state proceedings under federal

law are not ripe for adjudication and should be dismissed without prejudice under *Williamson*.

In *Williamson* the owner of a tract of land sued a county regional planning commission, alleging the commission's application of various zoning laws and regulations to the landowners' property amounted to a taking of the property. The commission contended that a government regulation that may be so restrictive that it denies a property owner all reasonable beneficial use of its property should not be viewed as a taking under the Fifth Amendment, but rather as a violation of the Fourteenth Amendment's due process clause. This Court found, however, that whether application of the commission's regulations to the landowner's property constituted a taking under the Fifth Amendment *or* constituted a violation of the landowner's due process rights under the Fourteenth Amendment, the landowner's claim was premature because the landowner had not yet obtained a final decision regarding the application of regulations to its property, nor utilized state procedures for obtaining just compensation. In so holding, this Court stated that a claim that application of government regulations effects a taking or property is not ripe until the government entity charged with implementing the regulations has reached a final decision. *Williamson* at 186. *See also Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981).

The landowner in *Williamson* made the same argument offered by Willis here — that it should not be required to pursue the state action to a final decision because its federal lawsuit was predicated upon 42 U.S.C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. Willis, like the landowner in *Williamson*, relies in part upon *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). As this Court explained in *Williamson*, "[t]he question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is

judicially reviewable." *Williamson* at 192. The Court explained that the "finality" requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* Because the initial decisionmaker has not arrived at a definitive position on the issue raised by Willis — whether PSO's taking is for a public purpose — the finality requirement clearly applies in this case.

In short, *Williamson* did not limit its ripeness holding to the landowner's claim for just compensation. Rather, it applied the ripeness rule to both the taking issue and the due process claim. And when, as here, the state procedure provides for the determination of both the taking issue and the just compensation issue in one lawsuit, the landowner must await the outcome of that lawsuit.

None of the lengthy list of cases cited by Willis supports granting certiorari under Willis's fifth argument. Indeed, only two of the cases cited by Willis are condemnation actions. The first, *County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185 (1959), is clearly distinguishable. In *County of Allegheny* a county invoked applicable eminent domain statutes of the State of Pennsylvania to appropriate private property to improve and enlarge a public airport. A court-appointed board assessed damages for the taking. Both the county and the landowners appealed the amount of damages assessed. Subsequent to the time the county obtained possession of the property the landowner learned the property had been leased to a corporation for alleged private business use. The landowner, invoking diversity jurisdiction, sued the county in federal district court claiming that under Pennsylvania law private property cannot be taken by eminent domain for a private use. This Court held that under the particular facts presented, the federal district court should have considered the landowner's claim. The important

factual distinctions in *County of Allegheny* were: (1) under Pennsylvania law an objection to the necessity of the taking is brought in a proceeding *independent* of that in which compensation is awarded, unlike in Oklahoma where the determination of whether the taking is for a public use is made in the same proceeding as the award of compensation, and thus the separate suit brought by the Pennsylvania landowner in federal court had the same effect as if a separate suit had been brought in state court; and (2) the landowner's suit was based simply upon state law, and did not involve federal constitutional questions such as those present here.[16]

The second condemnation case cited by Willis is *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). *Sinaloa* is not in conflict with the Court of Appeals' decision here. *Sinaloa* involved a complaint that government entities deprived property owners of their rights under the Fourth, Fifth, and Fourteenth Amendments as a result of the government's actions in breaching a dam and destroying a lake. The Ninth Circuit cited its prior decision in *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986), in which it held that a plaintiff's failure to obtain from a state proceeding a final determination on the status of the property rendered his equal protection and due process claim unripe under *Williamson*. These cases are entirely consistent with the Court of Appeals' decision here.

Willis's fifth argument does not establish any compelling basis for this Court to grant certiorari.

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16. Jurisdiction of the federal court in *County of Allegheny* was based upon diversity of citizenship.

VI.

THE COURT OF APPEALS DETERMINED THAT UNDER OKLAHOMA EMINENT DOMAIN LAW A CONDEMNOR MAY TAKE POSSESSION OF THE CONDEMNED PREMISES PRIOR TO A HEARING ON THE RIGHT TO TAKE. IN ITS SIXTH ARGUMENT, WILLIS CONTENDS THE COURT OF APPEALS, IN SO HOLDING, FAILED TO FOLLOW OKLAHOMA LAW AS PRONOUNCED BY THE OKLAHOMA SUPREME COURT. CERTIORARI REVIEW OF WILLIS'S SIXTH ARGUMENT SHOULD BE DENIED AS WILLIS FAILS TO STATE A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI, AND WILLIS'S CLAIM HAS NO MERIT.

First, Willis's Sixth Argument — that the Court of Appeals misapplied Oklahoma state law — is not a basis under Sup. Ct. R. 10 for this Court to grant certiorari. There is no compelling reason for this Court to grant certiorari review of Willis's Sixth Argument, as no federal question is presented.

Second, Willis misstates the law of Oklahoma, which was accurately set forth in the Court of Appeals' opinion. Upon a proper reading of Oklahoma law, Willis's Sixth Argument has no merit.

As noted above, under Oklahoma constitutional and statutory authority, a condemnor may take possession of the condemned property after paying into court the amount assessed by the commissioners as the value of the taking. There is no constitutional nor statutory requirement that possession be delayed pending resolution of a condemnee's objection to the right to take.

The specific issue raised by Willis here was raised in *Town of Ames v. Wybrant*, 220 P.2d 693 (Okla. 1950). In *Wybrant* a municipality sought to obtain through condemnation the estate of the defendants in groundwater in lands owned by the defendants. The defendants sought to dismiss the condemnation

proceeding, claiming the municipality did not have the power to condemn the rights involved. When the trial court passed consideration of the motion to dismiss until the commissioners filed their written report assessing the value of the property taken, the defendants asked the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of prohibition to the trial court enjoining further proceedings. The defendants sought such a writ because once the report of the commissioners was filed the municipality stated its intention to pay the sum assessed into court, and to take immediate possession of the premises.

The Oklahoma Supreme Court denied the defendant's request for a writ of prohibition. After discussion of the Oklahoma eminent domain procedures, the Oklahoma Supreme Court concluded its opinion by stating:

> In view of the stress laid in the argument upon the alleged threat of plaintiff therein to enter possession before a determination of the question of plaintiff's right to condemn we deem it well to say that the District Court after objection to the Commissioners' report or the trial judge prior thereto *in a proper case and upon proper application and showing in connection with preliminary steps in condemnation could make an order temporarily restraining the condemnor from taking possession of the land pending final determination of the right to condemn.*

Id. at 696 (emphasis added). *See also Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925, 933 (Okla. 1935) (same). Thus, the Oklahoma Supreme Court reaffirmed what it held in *Wrightsman* that the landowner *may seek equitable relief* to restrain the condemnor from taking possession of the property pending resolution of the landowner's objection to the right to condemn. The Oklahoma Supreme Court has never deviated from this holding. Thus, a condemnee has a method to test the right to condemn prior to losing possession — by exercising its

right to seek an order temporarily restraining possession pending determination of the right to condemn.

The Court of Appeals relied upon *Wybrant* and *Wrightsman*, as well as *City of Bartlesville v. Ambler*, 499 P.2d 433, 436 (Okla. 1971). In *Ambler*, the Oklahoma Supreme Court reaffirmed that "[a]ccording to *Wybrant* and *Watkins* [*v. Board of Commissioners*, 174 P. 523 (Okla. 1918)], a public body having the power of condemnation *can be enjoined* from appropriating private property for public use until it has initiated condemnation proceedings and had its right to condemn the property finally determined." *Id.* at 436 (emphasis added).

In the state court proceedings, Willis *never* sought injunctive relief from the trial court prior to PSO taking possession of Willis's property and constructing the railroad. The Court of Appeals properly interpreted Oklahoma law, and properly determined that Oklahoma law did not support Willis's claims that either the Oklahoma eminent domain procedures are invalid or that Willis was deprived of its rights under Oklahoma law.

Furthermore, the Court of Appeals' expression on this state law issue was a synthesis of a somewhat confusing body of state court precedent. As recognized by the Court of Appeals, "[t]his point is obscured somewhat by decisions of the Oklahoma Supreme Court. . . ." Pet. App. A at 7a. As observed by respected authority,

> [i]t is the primary responsibility of state courts of last resort to construe provisions of state statutes and constitutions to adjudge the validity of state statutes in light of state constitutions. The Supreme Court is accordingly hesitant, when the highest state court has not spoken, and spoken clearly, to construe state statutes and constitutions of doubtful meaning, or to hold that a state statute violates the state constitution. And this hesitation is apparent in the exercise of the Court's discretion in granting or denying writs of certiorari to review decisions of federal courts of appeals alleged to be in conflict

> with applicable state law. The Court usually is reluctant to grant review of cases turning on state statutes or constitutions where state decisions on the issues are non-existent or are in confusion. Unless the court of appeals' decision can be shown to be clearly wrong, the Court in such circumstances refuses to add its conjecture to that of the court of appeals as to a matter which ultimately rests with the highest state court. As stated in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

Robert L. Stern, Eugene Gressman, Stephen M. Sharpiro & Kenneth S. Geller, *Supreme Court Practice* (7th Edition), p. 183.

As with its other arguments, Willis's sixth argument fails to present any compelling reason for this Court to grant certiorari review. Willis's argument is not that the Court of Appeals refused to follow state law on a state law question, but that the Court of Appeals misapplied state law. Not only is this argument inappropriate for certiorari review, but as demonstrated above the Court of Appeals' application of Oklahoma law was correct.

CONCLUSION

None of the six arguments tendered by Willis for certiorari review presents any compelling reason for this Court to exercise its discretion to review the opinion of the Court of Appeals. Accordingly, Willis's Petition for Writ of Certiorari should be denied.

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No. 99-256

IN THE
SUPREME COURT OF THE UNITED STATES

B. WILLIS, C.P.A., INC.,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma corporation; BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, a foreign corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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FACTUAL BACKGROUND

Respondents make a number of false representations concerning the facts of this case.

A. Respondents falsely assert that PSO argued and the state district court held that Willis had the burden of proof to vitiate the taking (Pg. 2 & 20). In truth, "PSO contended that discovery for the landowner was irrelevant. It argued that..Willis had no right to contest the taking of his land. The trial court held in favor of PSO..." App. M at 44a, ¶5.

B. Respondents falsely assert that possession of Willis' property was not appealed or addressed by the Oklahoma Supreme Court (Pg. 3). In truth, the Oklahoma Supreme Court explicitly held PSO's possession unconstitutional in ¶1 and further addressed possession in ¶6. (App. M at 43a, 45a) In a subsequent decision the Oklahoma Court of Civil Appeals acknowledged the "Supreme Court held the owner was entitled to discovery and a meaningful opportunity for a hearing **BEFORE PSO COULD...OCCUPY THE PROPERTY.**" (App. N at 54a, emphasis added).

C. Respondents falsely assert in Note 7 on Page 6 that Willis has not sought relief against BN under §1983. Willis brought §1983 claims against BN by virtue of a Motion for Summary Judgement which is independent of and does not rest on the complaint. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

ARGUMENT 1

THERE IS A PROCEDURAL DUE PROCESS RIGHT TO A PREDEPRIVATION HEARING ON PUBLIC USE WHEN A PRIVATE CONDEMNOR FILES CONDEMNATION PROCEEDINGS IN STATE COURT AGAINST PRIVATE PROPERTY.

On Page 13 of their brief respondents assert, "Willis' position was rejected by this Court long ago." Cited as authority are Bragg v. Weaver, 251 U.S. 57 (1919), Government of Virgin Islands v. 19.623 acres of land, 536 F.2d 566 (3rd Cir. 1976) and Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex. 1974) aff'd 419 U.S. 1042 (1974). None of these cases furnish support for the position asserted by respondents.

This Court has long made a clear distinction between the legislative issues of necessity and extent of taking and the judicial issue of public use.

"It is well settled that while the question whether the purpose of a taking is a **public one is judicial**...the necessity and the proper extent of a taking is a legislative question." Sears v. City of Akron, 246 U.S. 242, 248, 38 S.Ct. 245 (1918) (emphasis added). See also Rindge Co. v. Los Angeles County, 262 U.S. 700, 43 S.Ct. 689 (1923).

In Bragg v. Weaver, supra at 58 this Court specifically noted that the judicial issue of public use was not at issue:

> "It is conceded that the taking is under the direction of public officers and is for a public

use; •••Hence no discussion of these matters is required."

Government of Virgin Islands v. 19.623 acres of land, supra, is equally irrelevant to the case at bar. In that case the Government of the Virgin Islands sought to condemn land for a public highway. The landowner challenged not public use but rather the legislative issue of necessity. The 3rd Circuit Court of Appeals held quite correctly that the land owner had no procedural due process right to a predeprivation hearing on the legislative issue of necessity.

In neither case, however, is there a holding that there is no procedural due process right to a predeprivation hearing on the judicial issue of public use, the claim here asserted by Willis.

Likewise, Joiner v. City of Dallas, supra is misrepresented by respondents. In Joiner, a lawsuit was brought by landowners seeking to block a condemnation action by the City of Dallas. The landowners alleged a wide variety of constitutional infirmities in Texas eminent domain procedures including that it was a denial of due process to permit a condemnor to take possession without a predeprivation hearing on necessity and the extent of taking. The District Court disposed of these claims on the grounds that necessity and extent of taking were legislative issues.

With respect to the judicial issue of public use, the Court found the Texas scheme constitutional because a landowner could receive a predeprivation hearing on public use. "Condemnation, however, is for the general public - a criteria easily tested in the District Court before a loss of possession..." Joiner at 774.

In fact, Joiner v. City of Dallas, supra, utterly fails to support respondents for three (3) reasons. First, with regard to public use, the issue in Joiner was whether it was constitutional to require the landowner, in order to obtain a predeprivation hearing on public use, to file a second lawsuit in the State District Court after the condemnation proceedings were filed in the County Court. Oklahoma abolished county courts years ago, and all proceedings are conducted in the State District Court. In Oklahoma, to obtain a predeprivation hearing on public use, the landowner is not required to file a collateral lawsuit or seek an injunction. All a landowner must do in Oklahoma is file Exceptions to the Report of Commissioners challenging the right to take as Willis did. PSO v. Willis, 941 P.2d 995 (Ok. 1997) App. M at 49a, ¶17.

Second, in Joiner the landowners challenged the constitutionality of the Texas eminent domain scheme. In the case at bar, the constitutional violations occurred not because the Oklahoma eminent domain scheme is unconstitutional, but because PSO failed to comply with it.

Lastly, Joiner is largely irrelevant because the District Court clearly limited its holdings to governmental entities, noting that "We do not have an allegation that the power of eminent domain has been delegated to a private corporation..." Joiner at 774 N.20

In the case at bar, the condemnor is a private profit making corporation which hurriedly constructed a railroad in violation of both Oklahoma eminent domain law and federal railroad law (49 U.S.C. §10901) to provide BN single direct line service into PSO's plant after BN caught PSO breaching their contract by shipping coal into the plant on Union Pacific. Public Service Company of Oklahoma v. Burlington Northern Railroad Company, 53 F.3d 1090 (10th Cir. 1995).

ARGUMENT 2

WILLIS' TRESPASS AND §1983 CLAIMS ARE RIPE FOR ADJUDICATION ON THE MERITS.

Respondents argue that "All of Willis' constitutional claims arise out of the state court eminent domain proceeding." (Pg. 21) They further argue that "...the remainder of Willis' claims relating to the actual adjudication of the taking issue itself by the Oklahoma Courts clearly are not ripe until there is a final decision by the Oklahoma Courts on the right to take issue...the outcome of which have a direct impact on the plaintiffs' federal claims."(Pg. 22)

To justify these assertions both the Court of Appeals and respondents rely exclusively on cases dealing with "regulatory takings" resulting from the application of government regulations or administrative decisions.

Willis' claims primarily derive not from the state eminent domain proceedings themselves but from the fact both PSO and BN have physically invaded Willis' property without complying with the constitutional requirements established by both this Court and the Oklahoma Supreme Court.

This Court has long made clear and major distinctions between "regulatory takings" and actual physical invasions. Yee v. City of Escondido, California, 503 U.S. 519, 112 S.Ct. 1522 (1992); Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 102 S.Ct. 3164, (1982); Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 (1979).

The decision of the Court of Appeals reflects a complete refusal to follow those cases and make that distinction.

The decision of the Oklahoma Supreme Court (App. M at 41a) clearly establishes that Willis did not get the process due, the protection of the law afforded similarly situated landowners or adequate, effective and meaningful access to the court to defend its property.

As this Court noted in both Soldal v. Cook County, 506 U.S. 56 at 70, 113 S.Ct. 538 at 548 (1992) and U.S. v. James Daniel Good Real Property, 510 U.S. 43 at 49, 50, 114 S.Ct. 492 at 499 (1993), "When such multiple violations are alleged we are not in the habit of identifying as a preliminary matter the claims' dominant character. Rather, we examine each constitutional provision in turn."

Future proceedings in the state condemnation action are irrelevant. As this Court noted in Good Real Property, 510 U.S. at 62, 114 S.Ct. at 505 (1993), "The question before us is the legality of the seizure not the strength of the governments' case."

In Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983, this Court held that when substantive violations of constitutional rights occur, "the constitutional violation actionable under §1983 is complete when the wrongful action is taken."

ARGUMENT 3

THE COURT OF APPEALS HAS REFUSED TO FOLLOW STATE LAW AS PRONOUNCED BY THE OKLAHOMA SUPREME COURT.

Respondents falsely assert that Willis' argument is not that the Court of Appeals refused to follow state law on a state law question but rather misapplied state law. On Pages 24 and 29 of the Petition for Certiorari, Willis clearly argues that the Court of Appeals has refused to follow state law as pronounced by the Oklahoma Supreme Court.

On Page 29 of their brief respondents assert, "The Court of Appeals properly interpreted Oklahoma law, and properly determined that Oklahoma law did not support Willis' claims that either the Oklahoma eminent domain procedures are invalid or that Willis was deprived of its rights under Oklahoma eminent domain law."

Willis does not claim that Oklahoma's eminent domain procedures are invalid but rather that PSO failed to comply with them. Interpreting Oklahoma law is not the province of the Court of Appeals but rather the Oklahoma Supreme Court which did so in PSO v. Willis, supra and found that Willis was deprived of its rights under Oklahoma law. See App. M at 41a.

Respondents falsely assert that Oklahoma eminent domain law is a "somewhat confusing body of state court precedent". There is nothing confusing about the body of state court precedent. See PSO v. Willis, supra, App. M at 41a.

In 1935 the Oklahoma Supreme Court noted, "Condemnation procedure in this state is thus governed by statutes, which under a logical interpretation, contain no provisions authorizing a determination of questions relating to the right to condemn." Wrightsman v. Southwestern Natural Gas. Co., 46 P.2d 925, 930 (Ok. 1935). Finding that landowners had a constitutional right to a "tribunal in which to test the right to condemn prior to possession" (Wrightsman at 929) the Oklahoma Supreme Court exercised its power of judicial construction to establish that the procedure to obtain a predeprivation hearing on public use was to raise the issue in the Exceptions to Report of Commissioners. The Court explicitly rejected the concept of requiring the landowner to seek injunctive relief. Wrightsman at 930.

In Town of Ames v. Wybrandt, 220 P.2d 693 (Ok. 1930), the Oklahoma Supreme Court reconciled the obvious conflict between Wrightsman and what the Court of Appeals described as "the legislative authorization of immediate possession." The Oklahoma Supreme Court held that 66 O.S. ¶53(c) did not apply while the right to take was at issue. The fourth syllabus by the Oklahoma Supreme Court in Town of Ames states:

> 4. In a condemnation proceeding where the right to condemn is properly in issue it would be a denial of equal protection of the laws to authorize possession before there has been a determination of the right to condemn.

Syllabus is the law of the case in Oklahoma. Sampson Construction Co. Inc. v. Farmers Coop El. Co., Marshall, Okla., 382 F.2d 645 (10th Cir. 1967). Syllabus adopted by the Oklahoma Supreme Court is the law of the State of Oklahoma until overruled. Hartford Acc. & Indem. Co. v.

First Nat. Bk. & Tr. Co. of Tulsa, 287 F.2d 69 (10th Cir. 1961).

In 1997 in PSO v. Willis, supra, the Oklahoma Supreme Court reiterated the entire body of state court precedent in one clean, concise, comprehensive, easy to read decision. See App. M at 41a.

Oklahoma eminent domain law is "somewhat confusing" only to a practicing attorney whose practice is based on peddling political influence rather than a rudimentary knowledge of Oklahoma eminent domain law. See App. M at 46a, ¶9.

Willis is not misrepresenting the extent of the Oklahoma Supreme Court's decision. Rather Willis is confronted with the very situation described by Justice Frankfurter in Snowden v. Hughes, 321 U.S. 1, 16, 64 S.Ct. 397, 405 (1944):

> And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws?

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